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1928.

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Page	*Line*	*For*	*Read*
58	26	to	for
59	11	after "condition"	insert "as to"

Conquer v. *Boot,* p. 336. The paragraph preceding the beginning of the judgment of Talbot J. at p. 343, should read: "I had an opportunity of considering this case a few days ago, after the hearing was adjourned at the end of the argument for the respondent, and I came to the conclusion, to which indeed I was inclined to come at the time when the case was argued, that the appeal should be allowed. The argument for the respondent having been completed, I wrote a judgment to that effect and will now read it."

338	2 from bottom	(7)	(8)
	4 from bottom	(5)	(7)
445	footnote (1)	Com. Cas.	32 Com. Cas.
474	5	incurred	increased
509	2	mainly	merely
	23	deemed to have assets	deemed to have the amount of it as assets

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

WISBECH RURAL DISTRICT COUNCIL *v.* WARD.

[1926. W. 828.]

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Nov. 14, 15, 16.

Building Contract—Construction—Architect—Negligence—Interim Certificates of Architect—Overpayment of Contractors owing to Items included being payable separately to Sub-contractors.

The plaintiffs, who were a local authority, entered into a building contract and employed the defendant as architect. During the years 1920 and 1921 the defendant gave twelve interim certificates in pursuance of clause 29 of the contract. Clause 29 provided that no money should be paid to the contractor except on the architect's certificate, that the first certificate should begin when work of the value of 250*l.* was done, and that thereafter monthly certificates should be given. Sub-clause 3 provided: " The amount to be certified on his first and monthly certificates as due to the contractor shall be at the rate of 90 per cent. of the value of all work, including authorised extras and day work executed and materials delivered on the site up to the first day of the month in which payment is made. . . . ." Sub-clause 5 provided: " No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor to the value thereof. . . . ."

The certificates given included materials obtained from the Disposals Board at the direction of the Ministry of Health for which the plaintiffs had to pay direct on certificates given for that purpose by the defendant. The plaintiffs paid these sums, and also paid to the contractor the sums certified by the twelve certificates, with the result that the contractor was overpaid to the extent of 221*l.* The defendant also prepared a summary for submission to the Ministry of Health, and in this summary indicated that sums paid direct to the Disposals Board had to be deducted from the amount which he had certified.

The plaintiffs brought this action to recover this sum of 221*l.* from the defendant by way of damages for negligence. Sankey J. held that in giving the certificates the defendant had been guilty of negligence; that in giving them he was acting as agent for the plaintiffs and not as a quasi-arbitrator, and was therefore liable to the plaintiffs for his negligence. On appeal:—

Held, that the defendant had not been guilty of any negligence, because (1.) the defendant had rightly included in the twelve certificates the "materials delivered," including any received from the Disposals Board, (2.) the certificates and summary were none of them a final certificate, and (3.) the defendant had sufficiently indicated to the plaintiffs that the amount paid to the Disposals Board was to be deducted from the total amount certified by the twelve certificates.

Decision of Sankey J. [1927] 2 K. B. 556 reversed.

APPEAL from a decision of Sankey J. (1)

The plaintiffs, the Wisbech Rural District Council, sued the defendant, Mr. Frank Burdett Ward, to recover the sum of 221*l.* 3*s.* as damages for negligence.

The facts are fully stated in the judgments of the Court of Appeal, and were briefly as follows:—

Shortly after the conclusion of the war the plaintiffs proposed to erect a number of houses under a housing scheme, and for that purpose on September 30, 1920, they entered into a contract with Messrs. Wright & Wilson, a firm of builders.

The defendant was employed by the plaintiffs as the architect under that contract.

The Ministry of Health had rights in connection with the scheme by which they could compel the user of war material which the Disposals Board had for sale. The Ministry further had the right of revising the price and making allowances in the event of the prices of labour or

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material rising or falling during the continuance of the contract.

The houses in the years 1920–1 were in course of erection, and the defendant gave twelve interim certificates, the first on November 29, 1920, and the last on November 24, 1921, in pursuance of clause 29, which regulated the method of payment.

Clause 29 provided as follows: "(1.) *Interim Payments.*—No money shall become due to the contractor unless and until the architect shall certify in writing the amount thereof and that the contractor is entitled thereto.

(2.) When work to the value of 250*l.* has been executed and thereafter at monthly intervals the architect shall certify in writing to the contractor and the employers the amount from time to time payable to the contractor under this contract, and shall issue such monthly certificate not later than the 15th day of each month following that in which the first certificate is given, and the employer shall within fourteen days of the date of issue of the certificate pay to the contractor the sum so certified.

(3.) The amount to be certified on his first and monthly certificates as due to the contractor shall be at the rate of 90 per cent. of the value of all work, including authorized extras and day work executed and materials delivered on the site up to the first day of the month in which payment is made, and in preparing any certificate the architect shall take account of any alteration in rates of wages or price of materials which may by virtue of clause 25 hereof affect the amount payable to the contractor in respect of the works. The balance of 10 per cent. of the value of the work shall be retained until the sum so retained (hereinafter called 'the retention fund') amounts to 467*l.* 10*s.*, after which the contractor shall be entitled to be paid monthly to the full value of all work executed and material supplied. One-half of the retention fund shall be paid (subject to the conditions set out herein) to the contractor at the completion or occupation of the works, and the other half, together with any sum found due to the contractor at the final

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adjustment of the accounts by the quantity surveyor, shall be paid four months after completion or occupation of the works, provided that all defects for which the contractor is liable are made good and that he has otherwise discharged his liabilities under the contract.

(4.) The sums forming the retention fund shall be deposited by the employers as they accrue in a bank to be agreed between the parties in the name or names of the employers, and any interest on such sums shall be the property of the contractor, and shall be paid to him by the employers at the time of the final payment after completion.

(5.) No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor to the value thereof, nor shall it relieve the contractor from his liability to make good any defects as provided by these conditions, nor shall it in any way prejudice the employers in the final settlement of the accounts in any case where the contractor has been overpaid during the progress of the works."

In addition to giving those certificates to the builders the defendant also gave documents under which the plaintiffs paid the Disposals Board for some of the prime cost articles supplied by the Board. Unfortunately he gave some interim certificates and documents under which the plaintiffs had to pay both the builders and the Board for the same materials, consisting chiefly of baths, and Sankey J. found as a fact that it was owing to the defendant's negligence that he certified that a sum of 221*l.* 3*s.* was due both to the Disposals Board and to the builders.

After considerable delay, which his Lordship found was due to the fault of the defendant, the parties endeavoured to get a final settlement of the accounts, and as late as October, 1923, the defendant went through the accounts with some of the plaintiffs' officials and in effect admitted that he had made a mistake. This was shown by the document entitled: Summary 4. He did not deny the correctness of the sum paid twice over, and promised to obtain a refund from the builders. The plaintiffs gave the defendant an opportunity, at his request, to recover the amount of the money, if he could. Unfortunately the builders dissolved partnership, and one of them became bankrupt. The writ in the present action was then issued to obtain repayment by the defendant of the sum overpaid.

At the trial four points were taken on behalf of the defendant: (1.) That the defendant was a quasi-arbitrator and, therefore, not liable. (2.) That the action was premature, because there was power to rectify under a final certificate, and no final certificate had then been issued. Should that final certificate be issued it would be found that the builders had not been overpaid, because a sum of 221*l.* 11*s.* 8*d.* was due to them in respect of sums which they ought to be allowed for paying increased wages, and so in effect the plaintiffs had suffered no damage. (3.) If the matter could not be rectified there had been a final certificate contained in the document known as Summary No. 4, which was the document gone into between the parties to find what the exact position was, and the defendant had issued his final certificate and could not be sued for negligence. (4.) If the defendant was negligent, so too were the plaintiffs for not keeping and checking their accounts.

Sankey J. dealt with these points seriatim, and held: As to (1.) that in giving the interim certificates the defendant was not acting as an arbitrator or quasi-arbitrator; as to (2.) that there was no power to rectify by giving a final certificate; as to (3.) that Summary No. 4 was not a final certificate; as to (4.) that it was a question of fact and that the plaintiffs were in no way negligent and that there was no breach of any duty by them which they owed to the defendant. His Lordship accordingly gave judgment for the plaintiffs for 221*l.* 3*s.*

The defendant appealed. The appeal was heard November 14, 15, 16, 1927.

Schiller K.C. and *Linton Thorp* for the appellant.

Sir Malcolm Macnaghten K.C. and *Gerald Dodson* for the respondents.

The arguments used in the Court below were substantially repeated.

Having regard to the view taken by the Court of Appeal of the facts it did not become necessary for them to decide the question on which the case is reported in the Court below—namely, whether the defendant in giving the interim certificates was acting as an arbitrator or quasi-arbitrator.

LORD HANWORTH M.R. This is an appeal from a decision of Sankey J., who gave judgment in favour of the plaintiffs, the Rural District Council of Wisbech, against the defendant, Mr. F. Burdett Ward, who had acted as an architect in respect of certain building work in which they were interested. The case has a somewhat unfortunate history. It was tried before Sankey J. on parts of two days, January 19 and 20, 1927, when owing to the pressure of work which fell upon the learned judge he was unable to give consideration to the matters of law which arose and he reserved them for further argument in London. Then on July 8 he heard further argument, but as he had, as President of the Railway Commission, to deal with important cases before him, he had to take the further consideration of this case on the matter of law on July 19, and it was then that he came to the conclusion which he did, in favour of the plaintiffs in the action.

The facts of the case are these: The plaintiffs had embarked on what is called a housing scheme, and they were going to build at a place called the Gorefield site five pairs of houses. They entered into a contract, dated September 30, 1920, with the builders, who were William John Robert Wright and George William Wilson, of Terrington St. Clement, to undertake the work of erecting those five pairs of houses, and the architect who supplied the drawings and specification for the work was the defendant, who was to occupy the position and undertake the responsibilities of an architect in reference to this contract. Now I must deal with some terms of the contract more specifically in a moment, but to finish the history of the case it may be sufficient to say that the work was begun, and it was necessary for certain items of materials to be used on the site to be obtained and supplied from what I may call outside contractors. As a matter of fact, there were certain stoves, ranges, baths, bath covers and the like, which were obtained from what was known as the Director of Building Materials Supply. That source of supply was imposed upon the plaintiffs as a term of their receiving State assistance in their building scheme. In consequence of the war, or for some other reasons, that source of supply was available, and it was desired to make use of the materials thus available on these building sites, in which to some extent the State was interested. The building proceeded, and as provided in the contract certificates were given by the architect to the builder from time to time as the work proceeded. In all there were twelve certificates: the first certificate was given on November 29, 1920, for 400*l.*; the second certificate on January 19, 1921, for 700*l.*, and the certificates run on through the months of 1921 until the twelfth and last interim certificate was given on November 24, 1921, for 500*l.*, making the total of the interim certificates given by the architect to the builders 8700*l.* In the course of the year 1921 certain materials had been supplied by the Disposals Board. The approximate dates of delivery and the nature and cost of the materials were as follows: On May 12, 1921, stoves to the value of 77*l.*; on June 3, ranges to the amount of 130*l.* 1*s.* 2*d.*; on July 29, a range at a price of 6*l.* 7*s.* 8*d.*; on August 13, bath valves, and overflows for 3*l.* 5*s.* 4*d.*; on October 7, some baths for 50*l.* 5*s.* 4*d.*; and on October 7, bath covers for 5*l.* These figures together amount to a sum of 271*l.* 19*s.* 6*d.*, and it will be observed that the last invoice, or date in respect of the despatch or arrival of those goods which I have recounted, is October 7. That date is before the last interim certificate was given, which, as I have said, was on November 24, 1921.

It is not quite clear when the five pairs of houses were complete, but it was necessary, for the purpose of obtaining the subsidy, that some information should be presented to

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the Ministry of Health, and a summary was got out—it is called Summary No. 4—which was originally dated August 18, 1922. According to that summary there was a balance then due to the contractors of 45*l*. 16*s*. 6*d*. For some reason which is not fully explained, that summary had to be presented to the Ministry and had to be repeated by the defendant, and it was so repeated on September 12, 1923. After it had been so presented on that second date it was examined by Mr. Faircloth, the clerk to the plaintiffs, and he then found that the result of the figures appearing upon that summary and which showed a balance due to the contractors was incorrect, and after making certain corrections in red ink, he found that, instead of there being a sum due from the plaintiffs to the contractors, there was in fact a sum of 221*l*. 3*s*. due from the contractors to the plaintiffs by reason of over-payments made to the contractors by the plaintiffs. Some letters passed, and on February 12, 1925, Mr. Faircloth wrote to the defendant: "With reference to the final statement submitted in connection with the above scheme from which it appears that acting on your certificates the Council have overpaid the contractors the sum of 226*l*. 3*s*. I am directed by the Council to inform you that they will hold you responsible for the repayment of such amount and they leave it to you to take steps to recover the money from the contractors forthwith or failing this to pay to the Council the amount due." After that a writ was issued by the plaintiffs on March 15, 1926, charging the defendant with negligence. In accordance with the terms of the letter which I have read, the plaintiffs have sought to recover in this action the sum of 221*l*. 3*s*. from the defendant. The difference between 226*l*. 3*s*. referred to in the letter and the 221*l*. 3*s*., which is the figure in the statement of claim, arises in consequence of a sum of 5*l*. for the bath covers, which was otherwise adjusted. I may leave that item out, and I may call the amount in dispute 221*l*. 3*s*.

The action is one which is of serious import to the defendant. The statement of claim alleged that he had issued certificates whereby the plaintiffs had paid to the builders a sum of 8700*l.*, which, as it was alleged, was an overpayment to the extent of this sum of 221*l.* 3*s.* The charge against the defendant is this: "The said certificates were in fact erroneous and misleading, and the final statement"—that is what we have known as Summary No. 4—"was also incorrect. The said certificates and statement were given in breach of the implied term of the defendant's employment, or alternatively and for the reasons aforesaid were due to the negligence of the defendant in the discharge of his said duty as architect and quantity surveyor." Then as an alternative they say that he did not provide and retain a sufficient retention fund in accordance with clause 29, sub-clauses 3 and 4, of the contract. Quite properly, the defendant asked that this charge of negligence should be formulated with greater precision; so under particulars given it is stated by the plaintiffs that "The defendant was negligent in giving certificates which included sums not payable by the plaintiffs to the contractors at all, and which were in respect of the purchase of materials from other sources such as the Director of Building Material Supplies. He was further negligent in not getting out the final account until September 12, 1923, when the last certificate given was November 24, 1921, and in allowing the plaintiffs to overpay the said contractors by the sum of 221*l.* 3*s.*" I dwell upon those particulars because it is important, from the point of view of the defendant, to see what is the precise charge that is made against him and which we have to consider. It is plain that the question debated, discussed and charged in the action was whether or not the certificates that he had given led to the loss by the Council of 221*l.* 3*s.* It was made abundantly plain when the case was before the learned judge that the charge was in respect of these certificates and these figures. It was not that he had acted improperly or negligently as an architect in the matter of his design or in his supervision of the buildings; and it is made quite plain that no attack was made upon the defendant's professional judgment, nor is it suggested that there was any defect in measuring up or anything of that sort.

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Now the reason why this sum is sought to be recovered from the defendant must also be referred to. It would seem at first sight that a mere clerical error of this nature involving an overpayment to the contractors could be put right by an adjustment of the figures with the contractors; but Mr. Dodson for the plaintiffs says that this sum of 221*l*. 3*s*. is a sum which is spread—that is his phrase—over the whole of the certificates, which totalled 8700*l*.; and that the reason why the action is brought against the defendant is that an adjustment with Messrs. Wright & Wilson was not possible. It is unnecessary, for the purpose of this judgment, to decide whether that view is right or wrong. We are told that the partnership between Messrs. Wright & Wilson has been dissolved and that one of the partners has been adjudicated bankrupt, but it is not explained why there is not a claim for a sum recoverable from the partnership in respect of which the liabilities of the partners survive, the one being solvent, and the other being, as I understand, insolvent, but a person against whose estate an appropriate proof could be carried in. I therefore say nothing on this question whether the action was rightly brought against the defendant on the assumption that the money was irrecoverable from the contractors. We have not to decide that point, and it is right that it should be left open and undecided.

There is, however, in my judgment, a sufficient reason for saying that the defendant is not liable in respect of the charge which is made against him in this action. For the purpose of seeing whether there is a liability I must turn to the contract. This contract follows the lines with which those who are accustomed to deal with building contracts are not unfamiliar, and it contains in clause 29 the provisions for the method of payment. Clause 29, sub-clause 1, says: "Interim Payments.—No money shall become due to the contractor unless and until the architect shall certify in writing the amount thereof and that the contractor is entitled thereto." Then it proceeds to say, under sub-clause 2: "When work to the value of 250*l*. has been executed and thereafter at monthly intervals the architect shall certify in writing to the contractor and the employers the amount from time to time payable to the contractor under this contract, and shall issue such monthly certificate not later than the 15th day of each month"—I need not read the rest. What is he to certify month by month? Under sub-clause 3 it is said: "The amount to be certified on his first and monthly certificates as due to the contractor shall be at the rate of 90 per cent. of the value of all work, including authorized extras and day work executed and materials delivered on the site up to the first day of the month in which payment is made, and in preparing any certificate the architect shall take account of any alteration in rates of wages or price of materials which may by virtue of clause 25 hereof affect the amount payable to the contractor in respect of the works." Then 10 per cent. retention is to go on until a retention sum of 467*l.* 10*s.* has been built up, and thereafter the amount which is to be certified for is to be a larger sum. Then sub-clause 5 is this: "No certificate of the architect, except for the final balance, shall be considered conclusive evidence of any works or materials to which it relates nor to the value thereof." Reading clause 29 as a whole and paying attention to the passages which I have partly cited, it seems quite plain that these payments are interim payments, that the duty is imposed upon the architect month by month of giving certificates, and he is to give certificates of the work done and the materials delivered on the site up to the first day of the month when he is giving his certificate; and it is also plain that these certificates are in their nature interim, that they are not conclusive as to any works or materials to which they relate, or of their value, and that there is, therefore, a system imposed upon the architect from which all finality is removed, but which none the less leaves a duty upon him of giving these certificates, which can be asked for by the contractor, and are to be of a value which is to be estimated according to the work done and materials upon the site. Under clause 31 there is a provision as to payments to the sub-contractors, and " sub-contractors " is defined as persons who are the merchants or tradesmen who execute any work or supply any goods " for which prime cost prices or provisional sums are included in the specification or bills of quantities." I am prepared for the moment—I do not think it is necessary finally to decide it—to accept what Sir Malcolm Macnaghten has suggested, that any person who is supplying goods for this work, whether he does any work in reference to them or not, is to be deemed to be a sub-contractor within that clause.

The mistake that has arisen in this case appears to me to be in misunderstanding the duty imposed upon the architect under clause 29 and treating this summary No. 4 as if it were a final certificate adjusting the whole matter between the parties. In my judgment it is a summary got out for the purpose of being submitted to the Ministry. It is true that it bears on its face, " statement showing final payments due to the contractors," but so far as I can read the contract I do not find that this is a final certificate such as was contemplated in clause 29, sub-clause 5. Now pausing there for a moment, upon the facts which I have stated it is clear that by October of 1921 there had been delivered on this site goods to the value of 271*l.* 19*s.* 6*d.* Was the architect to take this into account in his interim certificates ? It is said " No." It is said that the payments in respect of these goods, or as to the larger portion of them, were to be made by the employers, that is the plaintiffs direct, to the Director of Building Materials Supply; that they were therefore removed from the contract and ought not to have found a place in it so as to enhance the sum for which a certificate was to be given by the architect to the contractor. But the plain reading of clause 29 seems to answer that argument. The architect had to give a certificate for the value of all the work executed and the materials delivered on the site up to the first day of the month in which payment was made. When the certificate of November 24 was given these goods had been delivered, and it would therefore be impossible to leave them entirely out of account when that certificate of November 24 was given; and if we are considering the question of negligence, it is right that the defendant should have taken into account a pencil document dated November 15, 1921. We are told that it contained the pencil figures which the defendant got out in order to see what amount he should certify for when he gave this last certificate, and according to the figures which are there he finds that there are still outstanding items of 543*l.*, which he deducts from the 1506*l.* which would on its face value appear to be due, and he says there is an available balance of 963*l.*, and he then gives a certificate for 500*l.* That pencil document is dated November 15, 1921, nine days before the certificate is given, and it is fair to the defendant to say that on the basis of the figures before him and which he had to consider when he gave a certificate for 500*l.* and no more, he was apparently acting with a considerable margin, and was diligent and careful not to place a certificate in the hands of the builders without leaving an adequate margin for adjustment.

Now as I have said, that adjustment appears never to have taken place, and what is said is that this summary No. 4 is to be taken as against the defendant, as the final adjusted figure. The argument that is presented to us is this. It is really based upon clause 37, sub-clause 2. That provides that "payment shall be made by the contractor to such sub-contractors (except in cases where the employers decide to pay any such sub-contractors direct) upon the certificate of the architect only and provided: (1.) that the amount of such certificate shall have been included and stated to have been so included in a certificate issued to the contractor, and (2.) that the contractor shall have received payment thereof; payment shall be made by him to the sub-contractor within seven days of the issue of the certificate to the contractor." It appears to me that sub-clause 2 of clause 37 is dealing with a matter wholly different from the interim certificates. It was intended to deal with this situation. Goods may be delivered upon the site or work may be done by a sub-contractor; that work may be apparent or those materials may be found upon the site. They will then fall to be taken

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into account in ascertaining what is the sum for which an interim certificate is to be given by the architect; but it may be that the architect ought to reserve, and is required to reserve, his judgment as to whether that work is correct or those materials are fit and proper for use. Under sub-clause 2 of clause 37, therefore, apart from the question whether the employers pay direct—a course which is contemplated as well in clause 37 as in clause 31—it is provided that the sub-contractor is not entitled to be paid immediately, he is not to be paid until a certificate has been issued by the architect stating that the goods or work ought to be paid for by the contractor, and further that the sums now certified to be paid by the contractor to the sub-contractor have been included in the certificate issued to the contractor. Let me take a simple case. Some work has been done by a sub-contractor, let me say an electrician. It is obvious that it has been done; it is included in an interim certificate given by the architect to the contractor; the sub-contractor, the electrician, seeks to be paid. If and when the architect has ascertained that it has been well and truly done, he can then give a different or another certificate, different in purpose altogether from the interim certificates under clause 29—a certificate that the work has been satisfactorily done, that the contractor ought to pay the sub-contractor for it, and pointing out to the contractor to whom the certificate would be presented by the sub-contractor that as a matter of fact the amount now certified has already been included in the interim certificate granted to the contractor on which he has been paid, because the building owner or the employer by another clause in the contract has to make a payment upon the interim certificates within a few days after their presentation to him by the contractor.

What ground is there then for saying that the point made by Sir Malcolm Macnaghten is good? For his charge is this. It was negligence on the part of the architect if any certificate—that is, if any of the interim certificates—included a sum due to a sub-contractor, unless it was made plain by the architect in such interim certificate that the amount was so included. Sir Malcolm has, quite rightly and quite candidly, confined himself to the point which is indicated in the statement of claim and in the particulars. He has not sought to go outside it, and his point is that these interim certificates, if and so far as they included moneys due in respect of materials delivered upon the ground, ought in their terms to have so stated, so that the Council would have had knowledge that they were asked to pay in this certificate to the contractor a sum of money for goods, and thus have had their attention drawn to the fact that they might be paying to the contractor for goods which they undertook to and in fact did pay for direct to the Disposals Board. When this summary No. 4 was produced it was corrected by the clerk to the plaintiff Council. The clerk to the plaintiff Council said this: "As a matter of fact there has been a payment made by us direct up to the amount of 271*l*. 19*s*. 6*d*. The fact that that payment has been so made ought to be adjusted, and if you adjust the figures upon the basis of direct payments made to the Director of Building Materials Supply then the figure that has been already paid to the contractors is too large by this sum of 271*l*. 19*s*. 6*d*."

Now I must say a word about this summary No. 4. It appears to me that it was much misunderstood at the trial, and I think when it is looked at the evidence which was given by the defendant in respect of it was justified. He said: "This document is not misleading, and for this reason" he called attention to the fact that on its face it bore this statement that the 271*l*. 19*s*. 6*d*. was explained as being less the value of the Disposals Board's goods paid for by the local authority as shown in the summary, and when he is dealing with the figures on the twelve certificates, in the total value of the twelve certificates which he gave he inserts the words "Less net payments under the twelve certificates of the contractors," and those net payments on the basis of the sum, if it had been paid direct, would be 8428*l*. But the plaintiffs when they looked at this would be able to say, "You must not take the net payments, because in fact we paid the gross face value of the certificates, and that gross face value was

8700*l.*" The correct appreciation, as it seems to me, of summary No. 4 would have shown that this summary was intended to explain what the situation was, subject to adjustment when a final certificate was obtained. Having regard to the terms of sub-clause 2 of clause 37, and to the duty of the architect under clause 29, it seems to me that the defendant was bound to give his certificates for the whole amount subject to the adjustment which must take place, and that in this summary No. 4 he had merely indicated what were the figures which would have to be adjusted. There is no charge against him—certainly none of mala fides—only a charge of mistake in figures. So far as his duty goes I think that he was bound to give the certificates as he did, and it is a misreading of clause 37, sub-clause 2, to put the construction upon it which is contended for by Sir Malcolm Macnaghten.

For these reasons, it appears to me that as the matter stands—and, as I say once more, without considering whether there was or could be an actual liability in that amount, or what the measure of damages could or ought to be—the plaintiffs have not established a liability for negligence based on these alleged mistakes against the defendant. For these reasons, therefore, the appeal succeeds and must be allowed with costs, and the action must be dismissed with costs.

Atkin L.J. I agree. This is a claim against a professional gentleman for damages for negligence in acting as architect to the Wisbech Rural District Council in respect of building houses for them under a housing scheme upon which they embarked with the sanction and the assistance of the Ministry of Health. The contract which was entered into is a contract approved by the Ministry and is indeed on a form provided by the Ministry, and the houses were duly built. The contractors were Messrs. Wright & Wilson and the defendant was the architect, who also acted as quantity surveyor. Included in the specification are, as is usual, certain items dealing with sums which are prime cost sums. I do not know that I have discovered all of them, but it will be quite sufficient for the present purpose to refer to a few of them. In the specification the builder has to provide standard pattern steel cottage casements at prime cost prices for each cottage, the total value of the casements coming to between 60*l*. and 70*l*. The builder has to allow the prime cost sum of 20*l*. per house for ranges, stoves and mantels. That is an item which comes into consideration in this case. As to the hot water system the builder is to allow the prime cost sum of 20*l*. for an approved non-pressure hot water system; and under the heading "plumber" he has to provide two cast iron enamel baths with bath waste plug and chain and hot and cold taps and so on complete at the prime cost of 7*l*. 5*s*. The contract provided, again in a usual form, that where there was a provision for prime cost prices or provisional sums the architect might nominate specialists, merchants or tradesmen or others to execute the work, and the persons so nominated were to be deemed to be sub-contractors. The agreement makes no provision for payment of the sub-contractors in the normal course except by the contractors, but there is a series of clauses which provide that in certain circumstances the building owner may himself, if he chooses, pay the sub-contractors direct. All that seems to me to be in quite ordinary form. The contract then provides (clause 29) for payment and for the architect making interim certificates under a heading in the clause which deals with method of payment, and begins: "(1.) Interim payments." I need not refer to the clauses of the contract which have been read by my Lord, except to make it quite plain that the interim payments to be made on the architect's certificates are exactly what they are described to be. They are interim payments; they are not to be conclusive in any way; and they are subject to final adjustment by the final certificate. They are sometimes called in the cases of the old contracts advance payments or advance certificates. Then the contract provides (clause 29, sub-clause 3) that in making the interim certificates "The amount to be certified on his first and monthly certificates as due to the contractor shall be at the rate of 90 per cent. of the value of all work, including authorized

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extras and day work executed and materials delivered on the site up to the first day of the month in which payment is made." The point that has arisen in this case is in respect of certain stoves and baths which were put into these cottages and in respect of which prime cost sums were, as I have said, provided. In respect of those goods the architect directed, no doubt at the desire of the Ministry of Health, that the goods should be supplied under an arrangement made by an official termed the Director of Building Materials Supply, and it appears that the department had made arrangements with manufacturers for the supply to the department of such articles as stoves and baths, and that the department were in a position to let the authorities engaged in building schemes under their Act have the benefit of these contracts at no doubt beneficial prices. The terms of the arrangement were that the department would direct the manufacturer with whom they had a contract to supply them to some local distributor, ironmonger or builders' merchants or what not, who would supply them to the work, but that the department were to be paid by the building owner, and they themselves would pay the manufacturer and the distributor in accordance with their contract and at contract prices. That was carried out in this case. The defendant nominated the persons from whom the Director of Building Materials Supply obtained the stoves and baths to supply these stoves and baths, and the consequence was that the building owners, the plaintiffs, came under an obligation to pay direct to the Director of Building Materials Supply the price of these stoves and baths; but nevertheless in the contract they were, of course, prime cost articles.

The first question that arises, indeed the only question that arises, is whether or not the defendant was negligent in including in the amount of his interim certificates the value of these stoves and baths. We have been told over and over again that that is the question that is in dispute in this action. I agree; I think on the pleadings that is so. I think at the trial a different issue was raised. What was then said was: "You have certified for the payment to the builder of the price of these stoves and baths in your interim certificates; you have also certified that the building owner was to pay the price of these to the department; and, without saying in which respect you were negligent, you must clearly be negligent in certifying that the payments are to be made to both the builder and to the department," and by reason of that it was said that the plaintiffs have suffered damage.

The first question arises upon the construction of the contract, because it was first of all said by Sir Malcolm that on the construction of the contract it was the duty of the architect, if he included the value of the prime cost articles in his interim certificate, at the same time to specify in that certificate the amount that he had included for a prime cost article. Then it was said that under the terms of clause 37, sub-clause 2, the builder was to pay to the contractor the amount so stated within seven days of the issue of the certificate to the contractor. It was made reasonably plain on construction that clause 37, sub-clause 2, does not provide anything of the kind, and I think that that is obvious. We are dealing now on the construction of the contract with an ordinary case where there are no such exceptional circumstances as the provision of prime cost articles on the terms that they are to be paid for only by the building owner. If you take the articles that are included at prime cost in this contract, and might be included in others, it is plain that the goods may be delivered upon the work a considerable time before they are in fact incorporated in the building; and it is also plain that on the terms of the contract the architect is to include the value of those goods in the interim certificate. Under the contract the builder is not allowed to take the materials away once they have been deposited upon the work. I have not paused to consider whether the effect of that clause is to make those goods the property of the building owner or not; it is quite unnecessary; but it is quite plain that the contract contemplates that the value of prime cost goods and of all other goods shall be considered by the architect when he is making his interim certificates; indeed, he is bound to do it. The provision in clause 37, sub-clause 2, does

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not mean that when the values of prime cost goods are first put in an interim certificate they are to be specified, so that the builder is obliged to pay for them within seven days of the time when he gets the certificate. If that were so, it appears to me the effect would be to defeat the object of the contract altogether; it would mean that the goods might have to be paid for at the expense of the building owner before ever they had been used or tested, and that the builder would be bound to pay what amounts to cash for goods which may have been specified on credit terms. It is obvious that there has to be a second certificate before the builder is allowed to pay for them, and if the goods are to be paid for to the sub-contractor then they can only be paid for on a subsequent certificate being given by the architect specifying the goods and stating that they have already been included in a previous certificate; if that amount has then been paid then the builder is, of course, liable to pay the sub-contractor.

That appears to me to determine this case, because we have been told by Sir Malcolm that he puts his case—and I think he is quite right in so putting his case—solely on the ground that the defendant negligently included the amount of these prime cost goods in these interim certificates. The only question, therefore, that can arise is whether there is any difference made by the fact that the prime cost goods in this case were obtained upon terms that they had eventually to be paid for direct by the building owner and were not to be paid for by the builder. To my mind it makes no difference at all. The goods were on the premises; and the value of them therefore, in the strict terms of the contract, had to be included in the interim certificates, and the mere fact that they had to be paid for by the building owner does not in any way differentiate them from the case which is contemplated in the contract where the building owner may elect to pay for them to the sub-contractors direct. The position appears to me to be precisely the same. Therefore, in each and all of these interim certificates I think the defendant was not only entitled but was bound to include the value of these prime cost goods, the inclusion of which has been held to be negligent on his part. The plaintiffs' contention seems to me, with great respect, to be based upon a misconstruction of this contract altogether. Other things happen. The defendant at a later stage, but before he had made the last of his interim certificates, was asked to check some of the invoices, no doubt with a view to their being paid by the plaintiffs; and that was held up against him in the Court below as being negligent conduct on his part. But again that was a matter which he was obliged to do, because these goods have in fact to be paid for by the plaintiffs, and the plaintiffs were within their rights in asking him as architect to check these invoices before they paid. Nothing could prevent them from having to pay for the goods.

It appears to me that he was quite right in checking them, and in checking them with a view to payment by the plaintiffs. The real complaint in this case is that the interim certificates turn out to amount to 8700*l.*, and that in a final summary given to the Ministry the total amount due to the builders is 8478*l.* 17*s.*, leaving a difference of some 221*l.* odd, which would be due to the builders upon the footing of these payments and that account. But that appears to me to have nothing to do with the question of interim payments. If the defendant did include the right elements in his figures, the only question that could eventually arise is I think whether upon the whole in giving, say, his last certificate he negligently certified too much; but in respect of that it is only necessary to say that the plaintiffs expressly disclaim any attack upon the defendant's professional skill and judgment as an architect, and expressly excluded any mistake in measuring up and valuing, and they said that this was merely a clerical error in certifying something twice over. If the question had been gone into the defendant could have produced the calculation that he made when he gave his last certificate for 500*l.*, showing that there was then a balance of some 463*l.* in hand, which would provide for the necessary retention fund and which would have given an ample margin from which this adjustment of these figures could be made. And, apart from that altogether, he said: "It is quite true that I have prepared a summary for the Government, but I have prepared it upon the footing which they told me to adopt' '—namely, to leave out a question which had arisen between the builders on a matter of extra cost—" and adopting that provision I have made out these sums of what was due to the builders, and I assumed when I prepared my figures that they either would adjust this amount in the final account or that from the certificates which I had given they would have deducted the amounts which they had paid direct to the department." All that, as I say, seems to me to be quite irrelevant to the actual case which is now put before us.

We are relieved from considering a good many other questions that would arise in the case if we took a different view of the construction, because the plaintiffs here would be unable to recover unless they could show that they had lost this sum of money by reason of the so-called negligence of the defendant. An odd position exists in that respect, because one of the builders is still solvent and, therefore, is liable to make good to the plaintiffs any amount that has been overpaid to him; and it was only necessary to obtain a final certificate, which has never been obtained, for the purpose of enforcing that claim against the solvent builder, Mr. Wilson. The two partners dissolved partnership, and apparently Mr. Wilson's former partner unfortunately later became insolvent and was adjudicated a bankrupt. In order to enforce the claim against Mr. Wilson it would be necessary to get a final certificate. It appears that the plaintiffs have never required the defendant to give them a final certificate, but they preferred to claim this 220*l.* against him personally. I have very little doubt that one of the reasons for that was this, that if they had asked for a final certificate that the defendant, who had already expressed his view that there was a good deal to be said for the builders' claim to have an allowance in respect of what are called "out of time wages," would increase the standard rate of wages by a sum which is equivalent to this 220*l.*; and it might very well be that if the plaintiffs had in fact asked for a final certificate so as to bring into account the sum which has been overpaid to the builders, there would be a cross amount which might exceed this sum of 220*l.* Whatever the reasons were, at any rate the matter has not been gone into. It appears to me that if this case had gone on the plaintiffs might have been in very considerable difficulty in proving any damages at all.

There is a further point which I desire at any rate to reserve, and that is the point which arises out of *Chambers* v. *Goldthorpe.* (1) In that case it was decided that an architect in granting his final certificate under a contract such as this was acting as a quasi-arbitrator and could not be sued for negligence, because he had no duty, especially to the building owner, to be careful, and that he owed a duty both to the builder and to the building owner to decide impartially what was the amount due from one to the other. In the absence of good faith he could not so decide. I am not aware of any case which has extended that doctrine to the granting of interim certificates, and I do not desire to express any opinion about it, except to say that it is obvious that that case would have to be very carefully considered before we came to a conclusion in favour of the plaintiffs, supposing that negligence were otherwise proved. In this case it appears to me quite definitely to be disproved.

Therefore, I agree that this appeal should be allowed with costs, and that judgment should be entered for the defendant with costs.

LAWRENCE L.J. I agree. The charge made by the plaintiffs against the defendant is one of negligence in the exercise by the defendant of his profession as architect. In this and in all similar cases it is of first importance to the defendant to know exactly what the charge against him is. Here we are not left in doubt. Sir Malcolm Macnaghten has, in the clearest terms, defined the charge which is made

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against the defendant in this Court. I do not pause to consider whether it is precisely the same charge as was made before the learned judge in the Court below, but the charge made here was open to Sir Malcolm on the pleadings and on the evidence. The only charge so made was that the defendant was negligent in including in his monthly interim certificates the value of certain goods for which prime cost prices were included in the specification and which goods had been ordered by the defendant through Messrs. Gotelee from the Disposals Board, and that having been so ordered, the defendant knew that the plaintiffs and not the contractors would have to pay the Disposals Board for those goods.

Whether the defendant was negligent in this respect depends, in my judgment, entirely upon the construction of the contract, and, before saying the very few words I have to say upon that, I would mention that Sir Malcolm was tempted once or twice to go beyond the precise charge which he had formulated in two respects—namely, by contending, first, that defendant had over-certified on the interim certificates, and, secondly, that in granting those certificates the defendant had not followed the course laid down in clause 31, sub-clause 1, by stating separately the amount due to sub-contractors. Neither of these matters (as Sir Malcolm realized, when it was pointed out to him) came within the charge as formulated in this Court, and Sir Malcolm frankly admitted that it would not be fair to make such charges without their having been investigated in the Court below and without the defendant having been given an opportunity to answer them.

Coming now to the main point I am of opinion, with the greatest respect for the decision of the learned judge and for the argument of Sir Malcolm, that it presents no serious difficulty when once the contract is understood—and, thanks to counsel's explanation, I think that I now do understand it. It seems clear that in the interim certificates which the defendant has to issue under clause 29 he is bound to include the value of all the work executed under the contract up to the first day of the month following, and that this work includes all authorized extras and day work executed and all materials delivered on the site. It is also plain from the subsequent provisions of the contract that the materials delivered on the site include all goods supplied by sub-contractors. It is said, however, that as one of those sub-contractors had supplied goods which would eventually have to be paid for by the plaintiffs, therefore such goods ought to have been excluded from the certificate. I think the answer to that is, that according to the terms of the contract the certificate must include all the goods on the premises, and that the question whether the plaintiffs or the contractors are going to pay for the goods supplied by the sub-contractors is a matter of adjustment thereafter, either as between the plaintiffs and the contractors or on the defendant's final certificate. Under the contract the plaintiffs may elect to pay to the sub-contractors direct such part of the amount included in the certificate as represents the work of sub-contractors or they may pay the whole of the certificate to the contractors and leave the contractors to pay the sub-contractors, in which latter case certain consequences follow. In view of this provision the argument that the defendant ought to have excluded the value of the goods supplied by the Disposals Board simply because the plaintiffs will have to pay for them loses all weight. It might have been argued that the plaintiffs had been given no opportunity to exercise their option, because the defendant had not certified the work of the sub-contractors separately, as he ought to have done under clause 31, sub-clause 1, but that is a different charge to the charge made against him, and one which he could probably have explained satisfactorily if it had been put to him, as for some reason or other it does not seem to have been the course of business between the defendant and the plaintiffs that he should certify the work of the sub-contractors separately, and no complaint seems ever to have been made on this account.

I do not propose to go through the terms of the contract in detail; my Lords have already done that. I therefore content myself with expressing my entire concurrence in their judgments. In my opinion this appeal succeeds, with the result that the action fails and will be dismissed with costs.

Appeal allowed.

Solicitors for appellant: *Withers, Bensons, Currie Williams & Co., for Metcalfe, Copeman & Pettefar, Wisbech.*

Solicitors for respondents: *Lee, Ockerby & Everington, for Sharp, Wade & Whittome, Wisbech.*

W. I. C.

K. B. D.
1927
Dec. 20, 21.
C. A.
1928
March 19, 20.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

STOTT AND ANOTHER *v.* SHAW AND LEE, LIMITED

Bill of Sale—Validity—Consideration—Money stated to be paid to Grantor—Payment to Creditor of Grantor at latter's Request—Defeasance or Condition—Contemporaneous Mortgage—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 8.

On June 24, 1925, the parties to a bill of sale for 1000*l.* entered into an agreement that the grantee should pay, as he then did, 600*l.* to creditors of the grantor in satisfaction of their debt, that the existing bill of sale should be cancelled, and that the grantor should give to the grantee a new bill of sale for 1600*l.* The new bill of sale provided that: "In consideration of the sum of 1600*l.* paid to" the grantor "by" the grantee "on the 24th day of June 1925," the grantor assigned the chattels to the grantee:—

Held, by the Divisional Court, that the new bill of sale truly set forth the consideration for which it was given as required by the Bills of Sale Act (1878) Amendment Act, 1882, s. 8.

Credit Co. v. *Pott* (1880) 6 Q. B. D. 295 followed.

A bill of sale provided that the grantor would pay to the grantee the principal sum of 1600*l.* with the interest then due "on the 24th day of December, 1925." A contemporaneous mortgage of other property, given as part of the same transaction and as a collateral security for the principal sum, provided as follows: "The mortgagor" (the grantor of the bill of sale) "hereby covenants with the mortgagee" (the grantee) "to pay to him on the 24th day of December next" 1925 "the sum of 1600*l.* with interest thereon. . . . And it is hereby agreed and declared that (subject to the right of the mortgagee to require repayment of the said principal on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter) the principal money hereby secured shall be repaid by instalments of not less than

20*l.*" on specified dates; these provisions not being contained in the bill of sale:—

Held, by the Divisional Court and by the Court of Appeal, that the bill of sale by being made contemporaneously with, and as part of the same transaction as, the mortgage containing that clause for repayment of the principal by instalments, was not made or given subject to a "defeasance or condition" within the meaning of the Bills of Sale Act, 1878, s. 10, sub-s. 3, and therefore that the fact that that clause was not contained in the body of the bill of sale or written on the same paper or parchment therewith did not avoid the registration of the bill of sale under that sub-section.

Edwards v. *Marcus* [1894] 1 Q. B. 587 and *In re Leber* (1908) 52 Sol. J. 483 considered.

APPEAL from Salford County Court.

In 1910 Robert Thornley bought from Albert Stott a piece of land at Flixton in Lancashire, and borrowed from the latter various sums which he expended in building a laundry on the land. In May, 1913, Thornley owed Stott sums amounting in all to 1000*l.*, which were secured as to part thereof by mortgages of the land and laundry premises and as to the whole by a bill of sale over the chattels upon the premises. For some time before the date next mentioned Messrs. Shaw & Lee, Ld., a firm of money-lenders, had been pressing Thornley for repayment of moneys which they had lent to him, and he again applied to Stott for assistance. An agreement was thereupon entered into between Stott and Thornley, that Stott should lend Thornley a further sum of 600*l.*, that the existing securities for the previous loan of 1000*l.* should be withdrawn, and that Thornley should grant to Stott a new bill of sale on the chattels in the laundry and a new mortgage on the premises, each of these new securities to be for the whole amount of 1600*l.* which would thus be owing by Thornley to Stott. On June 24, 1925, in pursuance of that agreement and by way of a further advance to Thornley, Stott, at the request of Thornley, paid 600*l.* to Shaw & Lee, Ld., in satisfaction of the debt due to them from Thornley.

By a bill of sale dated July 1, 1925, made pursuant to the agreement it was provided as follows: "In consideration of the sum of 1600*l.* paid to the said Robert Thornley by the said Albert Stott on the 24th day of June, 1925 (the receipt of which sum the said Robert Thornley hereby acknowledges) he the said Robert Thornley doth hereby assign unto the said Albert Stott, his executors, administrators and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the said sum of 1600*l.* and interest thereon . . . . and the said Robert Thornley doth further agree and declare that he will duly pay to the said Albert Stott the principal sum aforesaid with the interest then due on the 24th day of December, 1925. . . . ."

By an indenture of mortgage dated July 1, 1925, made pursuant to the arrangement, it was provided as follows: "In consideration of the sum of 1600*l.* paid by the mortgagee to the mortgagor on the 24th day of June 1925 being the amount already advanced by the mortgagee to the mortgagor on the security of a bill of sale dated the 1st day of July 1925 made between the mortgagor of the one part and the mortgagee of the other part (the receipt of which said sum the mortgagor hereby acknowledges) the mortgagor hereby covenants with the mortgagee to pay to him on the 24th day of December next the sum of 1600*l.* with interest thereon. . . . And it is hereby agreed and declared that (subject to the right of the mortgagee to require repayment of the said principal on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter) the principal money hereby secured shall be repaid by instalments of not less than 20*l.* . . . . on the 24th day of March the 24th day of June the 24th day of September and the 24th day of December in every year. . . . For the same consideration the mortgagor as beneficial owner hereby conveys unto the mortgagee all that plot of land" being the land above mentioned . . . . "and also all the buildings and erections now standing and being upon the said plot of land . . . . to hold the same unto and to the use of the mortgagee in fee simple subject to the proviso for redemption hereinafter contained. . . . ."

On December 10, 1926, Stott died. On January 21, 1927, Shaw & Lee, Ld., recovered judgment against Thornley in the High Court for a further sum of 157*l.* 9*s.* 6*d.*, and to enforce payment of the judgment debt the chattels of Thornley on the laundry premises were seized in execution. The executors of Stott paid that sum into Court and claimed the chattels under the last mentioned bill of sale; and interpleader proceedings were thereupon commenced. On February 8, 1927, an order was made transferring these proceedings to the Salford County Court and an interpleader issue was drawn up in which the executors of Stott, the claimants under the bill of sale, were plaintiffs, and Shaw & Lee, Ld., the execution creditors, were defendants.

It was contended on behalf of the defendants that the bill of sale was invalid, first, under the Bills of Sale Act, 1878, s. 10, sub-s. 3 (1), inasmuch as it was made or given subject to a "defeasance or condition" not contained in the body thereof or written on the same paper or parchment—namely, the clause in the mortgage relating to repayment of the principal by instalments; and, secondly, under the Bills of Sale Act (1878) Amendment Act, 1882, s. 8 (1), inasmuch as it did not truly set forth the consideration for which it was given.

The county court judge held that the bill of sale was not invalid on either ground and gave judgment for the plaintiffs.

The defendants appealed.

Wingate-Saul K.C. and *J. C. Jolly* for the defendants, appellants.

Singleton K.C. and *J. Lustgarten* for the plaintiffs, respondents.

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(1) The Bills of Sale Act, 1878, provides :—

Sect. 10: "A bill of sale shall be attested and registered under this Act in the following manner: . . . .

"(3.) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

The Bills of Sale Act (1878) Amendment Act, 1882, provides :—

Sect. 8: "Every bill of sale shall . . . . truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

[In the course of the argument reference was made, on the question of defeasance, to the following cases: *Edwards* v. *Marcus* (1); *Pettit* v. *Lodge & Harper* (2); *In re Leber* (3); *Ex parte Southam* (4); and *Hetherington* v. *Groome* (5); and on the question of consideration to the following cases: *Credit Co.* v. *Pott* (6); *In re Rouard* (7); *Richardson* v. *Harris* (8); *Bishop* v. *Consolidated Credit Corporation* (9); *Darlow* v. *Bland* (10); *Hamilton* v. *Chaine* (11); and *Ex parte Allam.* (12)]

SHEARMAN J. This case, which has been extremely well argued on both sides, is one of very considerable difficulty, and I deliver my judgment in it with much hesitation. Neither of the two questions which it raises appears to me to be entirely covered by any other decision, numerous though the decisions are relating to both these questions.

The facts on which the two points arise may be very shortly stated, and I will endeavour to summarize them. [His Lordship summarized the facts above set out, and continued as follows:] The first question that arises is whether this bill of sale truly sets forth the consideration for which it was given as required by the Bills of Sale Act (1878) Amendment Act, 1882, s. 8. The bill of sale states the consideration in these words: "In consideration of the sum of 1600*l.* paid to the said Robert Thornley (the grantor) by the said Albert Stott (the grantee) on the 24th day of June 1925 (the receipt of which sum the said Robert Thornley hereby acknowledges) he the said Robert Thornley doth hereby assign" the chattels described in the schedule. It is perfectly clear that, strictly understood, that statement was untrue; and it is argued that, that being so, the consideration was not truly stated, and the bill of sale is void. It is true that not one penny was paid to the grantor on that date; but it is clear that the bargain was that the grantor would give to the grantee this bill of sale, because on that very day 1600*l*. was due from him to the grantee, for which the latter could sue him in law. If the grantor had produced 1600*l*. in notes and handed it over to the grantee, then the grantee could have paid that sum on that date, by paying to the grantor 1000*l*., and a further 600*l*. which the grantor could immediately have handed to his creditors; but on that date the grantor's liability to repay the money was the same as if that had been done. As to the 600*l*., although no evidence was given it was stated that the grantor was actually present when that sum was paid to the creditors, and it is clear that he would not have signed the bill of sale unless his debt to the creditors had been cleared off, and these circumstances constituted a request in law by the grantor to make the payment on his behalf. As I have said, if the parties had met together and the 600*l*. had been paid to the grantor and immediately handed back, the result would have been the same.

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(1) [1894] 1 Q. B. 587.
(2) [1908] 1 K. B. 744.
(3) 52 Sol. J. 483.
(4) (1874) L. R. 17 Eq. 578.
(5) (1884) 13 Q. B. D. 789.
(6) 6 Q. B. D. 295.
(7) (1916) 85 L. J. (K. B.) 393.
(8) (1889) 22 Q. B. D. 268.
(9) (1889) 86 L. T. Jour. 426.
(10) [1897] 1 Q. B. 125.
(11) (1881) 7 Q. B. D. 319.
(12) (1884) 14 Q. B. D. 43.

Formerly, the question whether the consideration for a bill of sale was truly stated was argued in these Courts almost every day. A large number of cases dealing with the point have been reported, the more important of them in the official or quasi-official reports, and others in local newspapers. It appears from these cases that opinion has varied one way and the other, the tendency having been sometimes to regard the matter more strictly, and sometimes less strictly. There is one case, however, which has always been regarded with great respect in all subsequent cases—namely, the case of *Credit Co.* v. *Pott.* (1) It has been pointed out again and again in these cases that, on the principle "Lex neminem cogit ad vana," if the legal or business or commercial effect of the transaction can be taken to be the same as that described in the bill of sale, then the Courts will hold the consideration to be truly stated. In the case which I have mentioned Lord Selborne L.C., citing a dictum of Mellish L.J. in *Spargo's Case* (2) used these words: "It is a general rule of law, that in every case, where a transaction resolves itself into paying money by A. to B., and then handing it back again by B. to A., if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards." (1) In *Credit Co.* v. *Pott* (2) the consideration was described as being "7350*l.* now paid." I think that that case decided that, if both sums are due, one can say "now paid" or "then paid," and the same applies just as much if the grantor hand the money to a third party at the request of the grantor. It seems to me that that case is a cardinal and leading case on the subject, and I need not refer to the other cases which have followed it or been distinguished from it. I therefore think that the objection fails that in this bill of sale the consideration was not truly stated. I do not doubt that dicta may be found in other cases which are inconsistent with my decision in the present case, but those dicta must always be looked at in reference to the facts of the respective cases in which they were uttered, and they do not in my view override the main principle laid down in the leading authority to which I have referred.

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(1) 6 Q. B. D. 295.

(2) (1873) L. R. 8 Ch. 407.

The second question, to my mind, is one of much greater difficulty. The particular facts upon which it arises are these: On the same day on which the bill of sale was made and simultaneously with it as part of the same bargain a second document was executed containing a clause relating to the repayment of principal, that clause not being included in the bill of sale, which was absolutely in the statutory form and which it is therefore unnecessary that I should read. That document, which was a mortgage deed executed with regard to certain other property as a collateral security, contained this expression with regard to the consideration: "1600*l.* paid by the mortgagee to the mortgagor on the security of a bill of sale dated the 1st day of July, 1925," and also this clause: "The mortgagor hereby covenants with the mortgagee to pay to him . . . . 1600*l.* with interest thereon." The date of payment of the principal and the

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(1) (1873) L. R. 8 Ch. 414.

(2) 6 Q. B. D. 295.

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amount of the interest are the same as in the bill of sale. Then occurs this clause, which appears in the mortgage but not in the bill of sale: "It is hereby agreed and declared that (subject to the right of the mortgagee to require repayment of the said principal on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter)"—those opening words govern the words which follow—"the principal money hereby secured shall be repaid by instalments of not less than 20*l.*, such instalments to be paid by the mortgagor to the mortgagee on the 24th day of March the 24th day of June the 24th day of September and the 24th day of December in every year, the first payment to be made on the 24th day of September 1926, and the aforesaid interest shall be payable only on the balance of the principal money remaining owing on this security." It was argued on behalf of the respondents that that last provision as to payment by instalments means nothing, the submission being that as it is subject to the right of the mortgagee to require repayment of the principal on December 24, 1925, according to the foregoing covenant or at any time thereafter, and interest, on the whole so long as any part of the principal should be due the grantee can say that he will sue for the whole of the unpaid principal and will not have the instalments. I think that the contention may be correctly expressed as being that at any moment after the principal is due and unpaid the grantee can say that he will not take the instalments because he has a greater right, so that the provision amounts to no more than this, that if the grantee allows it the grantor may repay by certain instalments. I am unable to accept the argument on behalf of the respondents that that provision amounts to nothing at all. I think it was a part of the bargain, though a small part and of little value, and that it means that if after a certain date the grantee shall not require the full amount to be paid, then there are certain specified instalments forming separate parts of the principal which he can sue for as separate debts at his own option. It gives the grantee a right, which he would not have had under the bill of sale alone, to sue in a personal action for a separate portion of the debt. But that, I think, is the only right which it gives him.

It was argued on behalf of the appellants that the mortgage deed extended the grantor's right of redemption and thus altered the grantee's power to seize the chattels under the bill of sale. If I thought that these words in the mortgage deed had that effect, then no doubt I should have to hold that they came within the expression "defeasance, or condition, or declaration of trust" in the Bills of Sale Act (1878) Amendment Act, 1882, s. 10, sub-s. 3; but I am unable to see that they in any way defeated or affected the right of the grantor to redeem on payment of the sum secured by the bill of sale. I therefore think on the construction of the mortgage deed as distinct from the bill of sale, that it gave a mere personal covenant and did not affect the title of either the grantor or the grantee to the goods by impairing either the right of the grantee to seize them or the right of the grantor to redeem them.

In these circumstances we have to consider the question, which to my mind is one of great difficulty, whether or not the omission from the bill of sale of provisions similar to these last mentioned provisions of the mortgage deed relating to the repayment of the principal avoids the registration of the bill of sale under s. 10, sub-s. 3, of the Act of 1878 on the ground that the bill of sale was in fact given subject to a "defeasance, or condition, or declaration of trust not contained in the body thereof." In my view it does not, inasmuch as these provisions do not come within the meaning of these words of the sub-section.

We were pressed very strongly with the case of *Edwards* v. *Marcus*. (1) It was said that we were bound, by reason of that decision, to hold that all previous decisions on this point had been overruled, and to conclude that the notion that the defeasance or condition must be only a defeasance or condition in the interests of the grantor was disposed of, and that in considering whether a provision is within these words of s. 10, sub-s. 3, it makes no difference whether it is in favour of the grantor or the grantee. To my mind the answer to the question whether a provision is a "defeasance" depends upon whether it involves the defeating of certain rights, and I think it is clear that in the provision in question there is nothing defeating the rights of either of the parties to the bill of sale. It is also clear that there is no declaration of trust in the mortgage deed. Is there any "condition"? To my mind the decision of this case depends upon the answer to the question whether the word "condition" in a bill of sale means a personal term of the bargain between the grantor and the grantee, or some provision affecting the title of one or other of the parties to the goods comprised in the bill of sale. There are several cases dealing with the meaning of the words "defeasance or condition," but I need not mention all of them. One of them is the case of *Ex parte Collins* (1), where the original decision of James L.J. is to be found which was overruled in *Edwards* v. *Marcus*. (2) James L.J. there said: "The question is, whether the non-registration of the memorandum avoided the whole transaction. The Act, after providing that every bill of sale shall be registered, has in its 2nd section this provision," and after reading that section he continued: "The question, then, is, whether this memorandum is a defeasance, condition, or declaration of trust subject to which the bill of sale was made or given. It certainly is not a defeasance, nor is it a declaration of trust. Is it, then, a condition either in the technical or ordinary sense of the word? Conditions may be either precedent, subsequent, or inherent. A condition is precedent where, unless it is complied with, the estate does not arise; it is subsequent where, if it is broken, the estate is defeated; it is inherent where the estate is qualified, restrained, or charged by it; in every case it denotes something which prejudicially affects the interest of the donee." James L.J. went on to say that in his opinion the memorandum did not restrict, qualify, or charge the interest which was given to the grantee by the bill of sale, and that the rights of the grantee were not affected by the memorandum being

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(1) [1894] 1 Q. B. 587.

(1) (1875) L. R. 10 Ch. 367, 372. (2) [1894] 1 Q. B. 587.

unregistered. When that judgment was considered in *Edwards* v. *Marcus* (1) the portions of it which were objected to were the statements that a condition in every case denotes something which prejudicially affects the interests of the donee, and that in that case the rights of the grantee were not affected by the memorandum being unregistered. When I come to deal with *Edwards* v. *Marcus* (2) I find words which are consistent with the large construction of the word "condition" as meaning any part of the bargain between the parties to the bill of sale, and also with the narrower construction which I am putting upon it as meaning something affecting the right to redeem the goods on the one side or the right to seize them on the other. Lindley L.J. decided in that case that the term of the bargain which was not put into the bill of sale imposed a fresh burden upon the grantor, as it undoubtedly did, and he said: "Any condition, whether it is prejudicial to one party or to the other, seems to be within the mischief struck at, and that was the view taken by the Court in *Counsell* v. *London and Westminster Loan and Discount Co.* (3). *Ex parte Collins* (4) was not cited in that case; but when you see that the document was not a condition"—and the document in *Ex parte Collins* (4) to which he was referring was very much like the document here—"and would not affect the title of the donee, that case does not conflict in any way with the later case." Then Lindley L.J., in stating the ground of his judgment, goes on: "the title of the grantors is most prejudicially affected, because the grantee can hold these chattels until he is paid his principal and compound interest. Therefore, I think the case is brought within the section." He then goes on to use a wide term: "Looking at the matter as men of business the result is that you cannot split the bargain"—but he continues—"and put into the bill of sale what is allowed by the statute, and what is not allowed into the contemporaneous mortgage." In the present case there is nothing in the mortgage deed which could not have been put into the

(1) [1894] 1 Q. B. 587.
(2) [1894] 1 Q. B. 587, 592.
(3) (1887) 19 Q. B. D. 512.
(4) L. R. 10 Ch. 367.

bill of sale. From the other judgments in *Edwards* v. *Marcus* (1) and from the other cases it appears that the whole bargain must be contained in the bill of sale. To my mind the words "defeasance or condition" as used in the sub-section mean an agreement between the parties to the bill of sale affecting either the right of the grantor to redeem the goods or of the grantee to seize them.

The two points raised in this action are thus disposed of adversely to the appellants. I desire, however, to say that the learned county court judge relied upon a judgment of Bigham J. in the case of *In re Leber*. (2) In my view he was right in doing so, and although the report of that case is very short, it is clear that Bigham J. had there to deal with something which affected the personal rights of one of the parties to the bill of sale. In that case there was a contemporaneous mortgage under which the grantor undertook to keep the premises in repair and therefore became pecuniarily liable if he did not do so, and that undertaking was part of the bargain. Bigham J. thought that that undertaking had nothing to do with the bill of sale. It thus appears from that case that he was of opinion that an undertaking which had no relation to the title to the goods was not a condition within the meaning of the sub-section.

On these grounds I am of opinion that this appeal should be dismissed.

FINLAY J. I agree with my Lord on all points. I agree with him in his tribute to counsel, and without depreciating the arguments which we heard from senior counsel yesterday, I may say that I have been assisted by the able arguments presented by the junior counsel on both sides this morning. I also agree as to the doubt and difficulty attaching to one of the points in the case. With regard to the first point, which relates to the statement of the consideration for which the bill of sale was given, I can add nothing to what has been said. I think that the objection taken is of no substance, and that it is completely met by the authority of *Credit Co.* v. *Pott.* (1)

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(1) [1894] 1 Q. B. 587, 592.

(2) 52 Sol. J. 483.

With regard to the second point, I also find it to be one of great difficulty, and my view of it has fluctuated more than once during the argument. I think, however, that the truth of the matter is that there was here an additional term of the bargain in this sense, and in this sense only, that there was a collateral stipulation whereby a term was introduced having some operation; but that there was no variation or alteration of or addition to the terms of the bill of sale, if by that is meant something which affected either the rights or the liabilities of the parties to the bill of sale. Those rights and liabilities were, as I conceive it, exactly what they would have been if this contemporary document had not been entered into. None of the rights and liabilities under the bill of sale is in any way affected. To my mind, both on principle and on a general survey of the authorities, the better view appears to be that the bill of sale was not made or given subject to a defeasance or condition. The authorities on this point have been so fully dealt with in the leading judgment that I do not desire to add anything with regard to them. On that short ground I think on the whole that on this second point also the conclusion arrived at by the county court judge was right.

I therefore agree that this appeal fails.

Appeal dismissed.

J. R.

The defendants appealed.

Wingate-Saul K.C. and *J. C. Jolly* for the appellants. The point taken in the Divisional Court that the bill of sale did not truly set forth the consideration for which it was given is not now insisted on; but as to the other point—namely, that the bill of sale is invalid under the Bills of Sale Act, 1878, s. 10, sub-s. 3, inasmuch as it was made or given subject to a defeasance or condition not contained in the body thereof or written on the same paper or parchment—it is submitted that the Divisional Court came to a wrong decision. The clause in the mortgage deed as to repayment of the principal sum by instalments formed a material part of the bargain between the parties, and ought therefore to have been inserted in the bill of sale.

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(1) 6 Q. B. D. 295.

[The same cases were cited as in the Divisional Court.]

Cyril Atkinson K.C. and *J. Lustgarten* for the respondents were not called upon.

SCRUTTON L.J. This case comes before us on appeal from the Divisional Court affirming a decision of the county court judge on an interpleader issue. The execution creditors having recovered judgment against Thornley put in execution seizing certain personal chattels, whereupon the executors of Stott claimed those chattels as their property under a bill of sale. In the county court two points were taken on behalf of the execution creditors: first, that the consideration in the bill of sale was not truly stated. Upon that the county court judge decided against the contention, and his decision was affirmed by the Divisional Court, and in this Court Mr. Wingate-Saul has abandoned that point. The other point that was taken against the bill of sale arises under s. 10, sub-s. 3, of the Bills of Sale Act, 1878. It is said that in the mortgage, which secures payment of the same debt as that secured by the bill of sale, there is a provision which adds to or contradicts the provision of the bill of sale, and as it is not set out in the bill of sale but has to be looked for in another document—the mortgage—the bill of sale is void. It is a pity that "defeasance" and "declaration of trust" are the expressions used in s. 10, sub-s. 3, of the Act of 1878, but what I understand to be the principle underlying their use is that if for the same debt there are varying provisions or a number of provisions they must all be in the same document. If, therefore, one document contains a covenant to pay the debt and another document purporting to refer to the same debt varies the provision contained in the first document, the provision in the second document is a defeasance of the provision in the first document. The intention of the Legislature as indicated by the section is that if any one wants to know what the debt is for which personal chattels are secured by a bill of sale he should be able to obtain the information from one document only—namely, the registered bill of sale—and not have to inquire whether another document may not contain a different provision.

In this case the bill of sale, which relates to a debt of 1600*l.*, contains a covenant by the grantor that he will duly pay the grantee "the principal sum aforesaid with the interest then due on the 24th day of December, 1925." The same debt of 1600*l.* is also secured by a mortgage of the premises in which were the chattels in respect of which the bill of sale was granted, and by the provisions of the mortgage, which is dated the same day as the bill of sale, the mortgagor covenants with the mortgagee "to pay to him on the 24th day of December next the sum of 1600*l.* with interest thereon." So far, the obligation is the same as that contained in the bill of sale. Then comes the clause which raises the difficulty: "And it is hereby agreed and declared that (subject to the right of the mortgagee to require repayment of the said principal on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter)"—that reserves the personal covenant; then the covenant continues: "The principal sum hereby secured shall be repaid by instalments of not less than 20*l.*, such instalments to be paid by the mortgagor to the mortgagee on the 24th day of March, the 24th day of June, the 24th day of September, and the 24th day of December in every year, the first payment of the said instalments to be made on the 24th day of September, 1926." I find it very difficult to give any intelligible meaning to that clause unless it can be said that if the money has not been paid on December 24, because it has not been required to be repaid on that date, the mortgagee cannot claim the whole sum but only the specified instalment quarterly. If that is the meaning of the deed I think it would be a variation of the obligation as to the repayment of the principal debt; it would have ceased to be an obligation to pay 1600*l.* on December 24, 1925, and would have become an obligation to pay by instalments of 20*l.* quarterly, and would have amounted to a defeasance of the covenant on the bill of sale, because it was decided in *Edwards* v. *Marcus* (1) that the defeasance may be a variation either way, in favour of the grantor or against him. A defeasance, however it operates, must be in the same document as the bill of sale. I am, however, unable to read the clause as to instalments in the mortgage as in any way defeating the original personal covenant to pay 1600*l.* on December 24 or at any time afterwards. The personal covenant appears to me to be expressly reserved. It may be that the provision as to the instalments is not to affect the personal covenant to pay, but only to affect the right to foreclose on the real property, which is the security for the mortgage. It possibly may have that effect—I am not sure that it has—but if it has, it is dealing not with the debt but with the security for the debt. It may be that that fits in with the decision of Bigham J. in *In re Leber* (2)—a case which is not very fully reported, and on that account it is somewhat difficult to make out what it exactly decided. Some of the phrases are there inaccurately used, but I understand that the provision in the mortgage was that if the mortgagee had to repair the premises, which the covenantor had covenanted to do, he should be entitled to add the cost of doing this to his security or charge. It may be that this is on the same footing as the suggestion made as to the effect of the instalments in this case. I am not sure if the meaning suggested is that which the instalment clause bears, and I reserve my right to consider the validity of Bigham J.'s decision in a case which comes nearer to it on its facts than the present case, as I am not sure that it fits in with decisions of the Court of Appeal. In this case, as the instalment clause in the mortgage does not in my view affect the personal covenant to pay the debt for which there is a right to seize under the bill of sale, that clause is not a defeasance of the personal covenant in the bill of sale.

The appeal must therefore be dismissed.

(1) [1894] 1 Q. B. 587.

(2) 52 Sol. J. 483.

Sankey L.J. I agree. The bill of sale has been impeached on behalf of the execution creditors under s. 10, sub-s. 3, of the Bills of Sale Act, 1878, on the ground that in a contemporaneous mortgage there is a clause which operates as a defeasance, or condition, or declaration of trust which, not being in the bill of sale, avoids it. It is clear from *Edwards* v. *Marcus* (1) that we have to regard those two documents as one. There A. L. Smith L.J. said this (2): " The special case finds that the mortgage and the bill of sale were executed on the same day "—that is also the case here—" and that they were made to secure the same debt, and that they were both given as part of the same transaction; so that as I read it, the claimant has one contract in two documents; and if that be the finding, it comes exactly within what was said by this Court in *Counsell* v. *London and Westminster Loan and Discount Co.* (3), that if there is one contract in two documents, and there is anything in either which sins against the Bills of Sale Act, the contract in two documents cannot stand, and the bill of sale must be set aside. Lord Esher, in the case referred to, says that such a contract as the present does sin against the Bills of Sale Act; because, when the one contract in the two documents is read, there is a condition in the contract which does not appear in the bill of sale." In the present case, therefore, the only point for determination is whether there is in the mortgage a clause which operates as a condition or defeasance within the meaning of s. 10, sub-s. 3. It will be observed that with regard to the amount to be secured and the rights with regard to payment of the principal sum the clauses are the same in both documents. Then comes the clause in the mortgage which creates the difficulty and which is relied upon as invalidating the bill of sale. It reads as follows: " It is hereby agreed and declared that (subject to the right of the mortgagee to require repayment of the said principal on the 24th day of December next according to the foregoing covenant by the mortgagor or at any time thereafter) "—those are important words

(1) [1894] 1 Q. B. 587.
(2) [1894] 1 Q. B. 597.
(3) 19 Q. B. D. 512.

—"the principal money hereby secured shall be repaid by instalments of not less than 20*l.*, such instalments to be paid by the mortgagor to the mortgagee on the 24th day of March, the 24th day of June, the 24th day of September, and the 24th day of December in every year, the first payment to be made on the 24th day of September, 1926, and the aforesaid interest shall be payable only on the balance of the principal money remaining owing on this security." I suppose that clause must have some meaning although it is extremely difficult to discover it, because the provision as to payment by instalments is subject to the right of the mortgagee to require repayment of the principal sum on December 24 or at any time thereafter. I have great doubt whether any meaning can be attributed to the clause, unless possibly that suggested by Tomlin J. in the course of the argument—namely, that it merely affects the mortgagee's right as to foreclosure and has no effect upon his right to sue under the personal covenant. Whether it means that or not I do not think that it in any way affects the bill of sale. There is nothing in the mortgage which affects the rights or liabilities under the bill of sale, and, that being so, I am of opinion that the mortgage does not contain any defeasance, condition or declaration of trust which ought to have appeared in the bill of sale. I think that was probably the ratio decidendi of Bigham J. in *In re Leber* (1), although owing to the somewhat meagre report of the case this is not quite easy to determine.

For the reasons I have given I think the decision appealed from was correct.

TOMLIN J. I agree. The question raised can only be answered when a conclusion has been reached as to the true construction of the mortgage. Its language is certainly obscure, but it appears to me to be clear that the original right of the mortgagee to enforce the covenant for payment in full is kept alive. If that is so, the provision as to instalments has no practical effect at all. The suggestion that

(1) 52 Sol. J. 483.

some effect may be given to the provision as to instalments by holding that it limits the mortgagee's right in respect of foreclosure so long as the instalments are paid, is, I think, somewhat difficult to arrive at, but even assuming that that is the true effect of the clause it in no way affects the debt or the security given by the bill of sale; it is something which merely limits the mortgagee's right as to foreclosure of the real estate the subject-matter of the mortgage. It is difficult to see how the clause in question can amount to a defeasance, condition or declaration of trust subject to which the bill of sale was made. The rights of the grantee under the bill of sale remain intact.

Appeal dismissed.

Solicitor for appellants: *A. R. Lord, for B. Kuit & Co., Manchester.*

Solicitors for respondents: *Peacock & Goddard, for Barlow, Barker & Co., Manchester.*

J. S. H.

HASKELL AND ANOTHER v. MARLOW AND OTHERS.

1927
Dec. 16, 20.

Will—Devise of Dwelling-house to Tenant for Life—Direction to keep "in good repair and condition (reasonable wear and tear excepted)"—Failure by Tenant for Life to repair—Damage arising from natural Decay—Liability.

A testator devised a dwelling-house to his wife for her life, she insuring the same against loss by fire, "and also keeping the same in good repair and condition (reasonable wear and tear excepted)," and after her death he directed that the same should fall into his residuary estate, which was to be divided among his children in equal shares. The testator's widow occupied the devised premises until her death, a period of forty-two years. She did nothing actively to injure the premises, but did nothing substantially to counteract the natural process of decay. The plaintiffs, the trustees of the will, alleged that she had neglected to keep the premises in good repair and condition in conformity with the terms of the will, and claimed from the defendants, her executors, the cost of the necessary repairs:—

Held, that the testator's widow, having accepted and occupied the premises, was bound by the terms of the devise, that the words of the exception were not to be treated as mere surplusage, and that a reasonable meaning must be given to them, but that having regard to the length of time during which no substantial repairs had been done to the premises, and to the extent of the damage thereby caused, the widow, as tenant for life, was not protected by the words of the exception, and that her executors were liable for the damage arising from the natural process of decay.

APPEAL from an official referee.

The plaintiffs were the trustees of the will of William Leach, who died on November 26, 1884. By his will he devised a dwelling-house and garden to his wife, Charlotte Leach, for her life, she insuring the same against loss by fire to the full value thereof in the names of the trustees for the time being of his will "and also keeping the same in good repair and condition (reasonable wear and tear excepted)," and after her death he directed that the same should fall into his residuary estate, which was to be divided among his three children in equal shares. Charlotte Leach occupied the devised premises from the date of the death of the testator until her death on February 8, 1926. She did nothing actively to injure the house and premises, but did little to counteract the natural process of decay. The plaintiffs alleged that, in breach of the terms of the will, she had neglected to keep the premises in good repair and condition (reasonable wear and tear excepted), and claimed the cost of the necessary repairs from the defendants, the executors of Charlotte Leach. The official referee gave judgment for the plaintiffs for 550*l*.

The defendants appealed.

Rayner Goddard K.C. and *F. J. Tucker* for the defendants. The position as between remaindermen and a tenant for life in regard to liability for repairs is not the same as that between a landlord and tenant. A tenant for life is never liable to a remainderman for permissive waste, unless there are words in the instrument creating the tenancy which impose such an obligation. The words which were used in this will made the tenant for life unimpeachable for waste other than voluntary waste. The position as between a tenant for life and a remainderman was clearly stated in *In re Cartwright* (1), where it was held that a tenant for life, in the absence of an express duty to repair, is not liable for permissive waste. That decision was followed in *In re Parry and Hopkin.* (2) Acts which are regarded as permissive waste come within the words "reasonable wear and tear." Where a tenant covenants to keep a house in good repair, reasonable wear and tear excepted, he is responsible if the house is destroyed by causes not coming within the expression "reasonable wear and tear," such as destruction by fire or tempest. It is clear from the decision in *Davies* v. *Davies* (3) that where a tenant for life is put into possession of premises and is not made liable for reasonable wear and tear, he is not liable for permissive waste, because that arises from reasonable wear and tear. It would be wrong to interpret the clause which the Court has to construe as containing a primary obligation and words that are merely an exception to it. It is not unusual to find in documents—e.g., bills of lading, railway consignment, notes and the like

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(1) (1889) 41 Ch. D. 532.

(2) [1900] 1 Ch. 160.

(3) (1888) 38 Ch. D. 499.

—primary obligations which are so cut down by exceptions that very little is left. Under the clause now in question the tenant is liable for certain things which may not be within the contemplation of the parties—e.g., tempest or flood—but for nothing further. It is not material that it would have been reasonable for the tenant for life to have repaired in order to arrest decay. The plaintiffs must show that the damage to the premises was caused by something more than the ordinary wear and tear of a residence. In *Gutteridge* v. *Munyard* (1) and *Mantz* v. *Goring* (2) Tindal, C.J., seems to have ignored the words "reasonable wear and tear . . . . excepted," and, therefore, there was no decision as to their effect. Excepting *Davies* v. *Davies* (3), the clearest decision relating to the meaning of such words is *Terrell* v. *Murray.* (4) The effect of that decision is that the presence of those words in a lease relieves the tenant from liability for permissive waste. It is true that in *Miller* v. *Burt* (5) it was held that the words "fair wear and tear . . . . excepted" did not absolve the tenant from liability to maintain the premises in the same state as they were in when he took them, but neither *Davies* v. *Davies* (3) nor *Terrell* v. *Murray* (4) were apparently considered. Darling J. seems to have been influenced by *Lurcott* v. *Wakely and Wheeler* (6), but there the Court was not called on to interpret "fair" or "reasonable wear and tear." Cozens-Hardy M.R. did, however, indicate the limits to be placed on *Gutteridge* v. *Munyard.* (1) On the other hand *Terrell* v. *Murray* (4) was approved and followed in *Citron* v. *Cohen* (7), where the Court had to construe an exception of "reasonable wear and tear."

[*Scales* v. *Lawrence* (8) was also referred to.]

Owen Thompson K.C. and *H. C. Dickens* for the plaintiffs. The decision of the official referee was correct. The clause which the Court has to consider was designed for the benefit

(1) (1834) 1 Mood. & R. 334; 7 C. & P. 129.
(2) (1838) 4 Bing. N. C. 451.
(3) 38 Ch. D. 499.
(4) (1901) 17 Times L. R. 570.
(5) (1918) 63 Sol. J. 117.
(6) [1911] 1 K. B. 905.
(7) (1920) 36 Times L. R. 560.
(8) (1860) 2 F. & F. 289.

of the remaindermen, and must not be construed so that they receive the property, as the official referee held with reference to this house, in "a very shocking state of disrepair." The obligations of a tenant for life who holds under a will containing a clause such as that in the present will are the same as those of a tenant under a lease containing a similar clause. In *Woodhouse* v. *Walker* (1); *In re Williames* (2); and *Jay* v. *Jay* (3)—which were actions in respect of non-repair by tenants for life—no suggestion was made that the construction of the clause should be different according to whether it occurred in a will or in a lease or a tenancy agreement. If the construction contended for by the appellants is right the obligation to repair is nugatory, except in the case of damage resulting from tempest, flood or other Act of God, in which cases the tenant for life would have to rebuild: see Foà's Landlord and Tenant, 6th ed., p. 256. The clause must be construed in the light of the testator's intentions, and it is unlikely that he intended, to the prejudice of the remaindermen, to protect the tenant for life from liability to do minor repairs and yet leave her exposed to the much heavier liability of rebuilding. The construction contended for by the appellants gives an exaggerated force to the exception and none to the primary obligation. The true view is that reasonable force should be given to both the obligation and the exception. On that basis the exception must be so construed that the tenant for life is excused from her primary obligation to repair in respect of reasonable wear and tear only. The tenant for life must use the premises reasonably. Her user becomes unreasonable if she allows the premises to fall into decay, and the wear and tear suffered by the premises in those circumstances is also unreasonable.

This construction is not at variance with the authorities. In *Gutteridge* v. *Munyard* (4); *Mantz* v. *Goring* (5); and *Scales* v. *Lawrence* (6) little force was given to the exception, and the view was expressed that the clause must be construed

(1) (1880) 5 Q. B. D. 404.
(2) (1885) 54 L. T. 105.
(3) [1924] 1 K. B. 826.
(4) 7 C. & P. 129.
(5) 4 Bing. N. C. 451.
(6) 2 F. & F. 289.

on the give and take principle for which the plaintiffs contend.

[They also referred to *Manchester Bonded Warehouse Co.* v. *Carr* (1)].

F. J. Tucker replied.

Cur. adv. vult.

Dec. 20. SALTER J. delivered the following judgment: This is an appeal by the defendants from a judgment for the plaintiffs by the official referee.

By his will dated March 29, 1884, William Leach devised his house and grounds at Salisbury to his wife for life with remainder to his three children in equal shares. He died in November of that year. His widow occupied the house for forty-two years. She attained a great age, and died in 1926. After her death the house and grounds were found to be in a condition which was described by the official referee in his judgment as follows: "It is obvious from the point of view of internal decorations and the outhouses, it is now very badly kept and in places almost ruinous. The greenhouses have largely collapsed, the bridge has disappeared and the summer houses are a wreck. The whole premises have been allowed to get into a very shocking state of disrepair." It was common ground that the house was in a very good state of repair and condition at the time of the death of William Leach. The widow during her long life tenancy had done nothing actively to injure the house. She had merely omitted almost entirely to repair it, and for this long period of time she had done very little to counteract the natural process of decay.

The action was brought by the trustees of the will of William Leach against the executors of the late Mrs. Leach claiming the sum of 734*l.* 12*s.* by way of compensation for the dilapidated condition of the premises.

It is admitted that the widow having occupied under this devise is bound by the conditions in the will, and, in my opinion, the words which we have to construe bear the same meaning whether they occur in a will or settlement limiting

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(1) (1880) 5 C. P. D. 507.

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the interest of a tenant for life or in a lease or other contractual document imposing liabilities on tenants for years. It is further agreed that, since there was here obviously a breach of the covenant to keep these premises in good repair and condition, it rests upon the defendants to show that they come within the exception of reasonable wear and tear. Before the official referee counsel came to an agreement with a view to raising a plain issue and avoiding as far as possible detail and expense. In cases where a covenant of this kind has to be considered there is a natural tendency on the one hand to minimize and ignore the exception and, on the other hand, to exaggerate it, until it almost destroys the covenant to repair, and it was plain that the true view might lie somewhere between these two extremes. To avoid difficulties of that kind, counsel very wisely agreed and the official referee approved their agreement and acted upon it, that if the official referee should prefer the reading of this covenant put forward on behalf of the defendants, he should give judgment for the plaintiffs for an agreed sum of 97*l.* and the defendants should have the costs of the action, but that if he did not approve the defendants' reading he was to give judgment for the plaintiffs, with costs for 550*l.* He gave judgment for the plaintiffs for that sum, with costs, and the question is whether he was right in fact and law.

I will shortly deal with some cases which were cited to us in so far as decided cases can afford any help in the construction of particular documents. Apart from the authorities, I should have thought that the intention of the testator, as expressed in the passage in question, was tolerably clear. There is a plain and dominant intention to protect the interests of the remaindermen both as regards the house and the chattels, which were also left for the widow's use. She is to insure the house against fire, and that not in her own name but in the names of the trustees of the will. There is a substantial repairing covenant and, even as regards the chattels, there is provision made for seeing that they are not lost or wasted. On the other hand, it is clear that the testator did not wish his widow to be in the position of a tenant for years under a lease. She is not to be responsible for reasonable wear and tear, but that exception is to be construed reasonably, so as not to trench unduly on the generality of the covenant to repair or to injure unfairly the interest of the remaindermen.

Turning to the authorities, there are many cases in which the net liability imposed by a covenant of this kind has been considered, but only two which have dealt—and those perhaps rather slightly—with the exception of fair wear and tear considered alone and the effect that such an exception has upon the liability to repair under the covenant. The first case that is often referred to in cases of this kind is *Gutteridge* v. *Munyard*. (1) That was a case between landlord and tenant. There was a covenant to keep and leave in a certain condition of repair, "reasonable use and wear thereof in the mean time only excepted," and upon that covenant Tindal C.J. thus directed the jury: "The main subject of the demise is an old house. Now, when a very old building is demised, it is not meant that it should be restored in an improved state, nor that the consequences of the elements should be averted: but the tenant has the duty of keeping it as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care." That direction was the subject of some criticism in the Court of Appeal in *Lurcott* v. *Wakely and Wheeler*. (2) In that case, however, there was no exception of fair wear and tear.

Mantz v. *Goring* (3) was an action by landlord against tenant for damages for breach of the covenant to repair. The covenant was to keep "in tenantable repair, reasonable wear and tear excepted." The buildings were old. There was a verdict for the plaintiff. A rule nisi for a new trial was obtained on the ground of exclusion of evidence. The rule was discharged, and in giving judgment Tindal C.J., presiding over the Court, said: "Every one knows what such a covenant means, and the tenant must fulfil it according to the nature of the premises: for it is established by *Stanley* v. *Towgood* (1) and other cases that the same nicety of repair is not exacted for an old building as for a new one. It is clear, however, that justice has been done here according to that principle, for it was proved that it would have cost 155*l.* to put these premises in complete repair, and the jury threw off the 100*l.*, probably because they were old." That judgment, like the summing up in *Gutteridge* v. *Munyard* (2), seems to deal mainly with the application of a covenant of this kind to an old house.

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(1) 7 C. & P. 129, 133.

(2) [1911] 1 K. B. 905, 912.

(3) 4 Bing. N. C. 451.

The next case referred to was *Scales* v. *Lawrence* (3), also a landlord and tenant case. There there was a covenant so often as need should require, well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse, etc., a house and premises, and to leave the premises in such repair, "reasonable wear and tear excepted." It was held that if at the expiration of the lease the tenant had repaired within a reasonable time before leaving, he was only bound, "in addition to the repair of actual dilapidations, to clean the old paint, etc., and not to repaint, etc." Upon that covenant Willes J. directed the jury: "No tenant is bound to leave, for his landlord, a new house; but the house which he took, in a state of fit repair, as such house. And if he has painted the outside in three years, and the inside within seven years, he is not bound to do it again when leaving, unless so far as is required by actual dilapidations or destruction of the paint; and so of other repairs. He may, if he likes, have the benefit of his repairs, so as to leave the premises in a fit state, reasonable wear and tear excepted. If he painted and papered within seven years, and there is no damage in the way of breaking down or tearing off, then the reasonable construction of the covenant is, that he should 'cleanse' the old paint, etc. (or renew it only where destroyed), and give up the house in a clean and fair condition, and for fair wear and tear he would not be liable. Questions of this sort are questions of fact for you, to be decided on what are the

(1) (1836) 3 Bing. N. C. 4.

(2) 7 C. & P. 129, 133.

(3) 2 F. & F. 289, 291.

substantial merits of the case rather than on strict rights or extreme law. The landlord is not to claim for every crack in the glass or every scratch on the paint. The reasonable rule probably would be not to charge for a pane of glass merely with one crack in it, and so forth. Such covenants must not be strained, but reasonably construed, on the principle of 'give and take.'"

I think that the point to be made for the present purpose from those three cases is that in all of them very little stress is laid on the exception of reasonable wear and tear. The covenant is construed in those cases not quite, no doubt, as it would have been construed, but very much as it would have been construed if that exception had not been present. Those three cases I think go strongly to show that this exception is not to be construed as making any great or grave inroad on the general liability to repair.

The first of the more modern cases is *Davies* v. *Davies*. (1) That was a case tried before Kekewich J., and it raised the question whether a lease which had been granted by a tenant for life went beyond the power of leasing given to such tenants by the Settled Estates Act, 1877. That statute provides that such leases shall not be made without impeachment of waste. The lease was granted exempting the lessee from liability for "fair wear and tear and damage by tempest," and the question was whether that exemption protected the tenant for years from any liability which would have rested on him at common law. It was plain that it did. The exception of damage by tempest alone would have been sufficient to invalidate the lease, and that being so, it was unnecessary to decide how far the terms of the lease relieved the tenant for years from liability resting on him at common law. The learned judge's observations, therefore, were not strictly necessary to the decision of the case. I do not mean to say that I in any way differ from them. The learned judge said: "The result is that the tenant, although he is liable to the covenant to repair, is not to be liable for any repairs consequent upon or rendered necessary by fair wear and tear, or by damage from tempest. If those words were not there, any dilapidations found at any time or at the end of the term by reason of the wear and tear, the wearing out of the walls and floors of the public-house, for example, from the constant traffic and so forth, he would be liable to replace, and if unfortunately by a storm his chimney-pot was blown down, or he had his roof broken he would be bound to put it straight, and restore the place to good and substantial repair. From those things he is rendered free by that exception—that is to say, by that exception he is rendered unimpeachable for waste in those particulars. That is just what the statute says he shall not be, and I think that that shows that the provisions of the statute have not been complied with." Whether those observations are absolutely correct or not, I see nothing in that decision to affect the view which I take of this covenant.

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(1) 38 Ch. D. 499, 505.

The next case is important, because it is one of the only two cases in which the meaning of the exception has been separately considered. It is *Terrell* v. *Murray*. (1) That was an action by landlord against tenant for breach of contract in failing to deliver up the demised house in the agreed state of repair. The covenant was to deliver up " at the expiration or sooner determination of the said term in as good repair and condition as it is now in, reasonable wear and tear . . . . excepted." There was no covenant to repair during the term. At the expiration of the term the lessor claimed for dilapidations including three items, one for painting the outside woodwork of the house, another for repointing the brickwork, and the third for repairing parts of the kitchen floors which had become affected by dry rot. It was held that the lessee was not liable for those three items. The official referee had found the liability at 39*l*., which included 12*l*. for painting the outside woodwork of the building, 2*l*. for repointing certain brickwork, and 5*l*. for repairing parts of the kitchen floor. On appeal the Divisional Court gave judgment for the appellant, the defendant. Mr. Bonsey, for the plaintiff, went so far as to argue that the words in the exception were mere surplusage, and did not, at any rate, apply to the outside of the house. Bruce J. said that it was a little curious that there was no very satisfactory authority as to the meaning of the words "fair" or "reasonable" wear and tear. He could not agree with Mr. Bonsey when he said that no meaning ought to be given to the words at all, nor could he agree that they had no operation in regard to the outside of the premises. The meaning of the covenant in his opinion was that the tenant was bound at the end of the tenancy to deliver up the premises in as good condition as they were in at the beginning, subject to the following exceptions, that was to say, dilapidations caused by the friction of the air, dilapidations caused by exposure, and dilapidations caused by ordinary use. As he was of opinion that outside painting was not a thing the tenant was bound to do under that covenant, and as the amount due to the plaintiff would thus be reduced to the amount paid into Court, he gave judgment for the defendant. Phillimore J. felt some difficulty, but on the whole he concurred. The only points decided in that case were that an exception of reasonable wear and tear is not to be regarded as mere surplusage, and that a proper meaning must be given to it, and that there was no liability cast upon the tenant to do outside painting. That case was much relied upon by the appellants but I find nothing in it to alter the view which I have formed. The next case is *Citron* v. *Cohen*. (1) In that case Sankey J. accepted the definition or explanation of "reasonable wear and tear" given in *Terrell* v. *Murray* (2), but the case was decided on other grounds.

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(1) 17 Times L. R. 570.

The next case is *Miller* v. *Burt*. (3) In that case the house was old, and was in bad repair at the beginning of the term. The covenant was to keep the house in the same state of repair, that is to say, it amounted to a covenant not to allow the house to go from bad to worse, "fair wear and tear excepted." The Court pronounced a formula for the guidance of the arbitrator in these words: "The tenant is responsible for repairs necessary to maintain the premises in the same

(1) 36 Times L. R. 560.
(2) 17 Times L. R. 570.
(3) 63 Sol. J. 117, 118.

state as when he took them. If, however, wind and weather have a greater effect on the premises, having regard to their character, than if the premises had been sound, the tenant is not bound so to repair as to meet the extra effect of the dilapidations so caused." That appears to be nothing more than a statement that in dealing with a covenant to keep old premises in the same state of repair as they were in at the date of the lease, the age of the premises and their condition at the beginning of the tenancy must be taken into consideration, but that would equally have been so if there had been no exception of fair wear and tear, and it appears to me that that formula throws no light at all upon the meaning and effect of a fair wear and tear exception.

The last case referred to was *Manchester Bonded Warehouse Co.* v. *Carr.* (1) There the plaintiffs had demised certain floors in a warehouse to the defendant, and the defendant had covenanted to repair, maintain and keep the inside of the premises in good and tenantable repair and condition and to deliver them up at the end of the term, damage by fire, storm, or tempest, or other inevitable accident, and reasonable wear and tear only excepted. Five points were discussed, but the only one which is now material was the extent of the liability of the defendant under his covenant. Lord Coleridge C.J., delivering the judgment of the Court, said: "It only remains to consider whether reasonable wear and tear can include destruction by reasonable use. These words, no doubt, include destruction to some extent, e.g., destruction of surface by ordinary friction, but we do not think they include total destruction by a catastrophe which was never contemplated by either party." That case and *Terrell* v. *Murray* (2) are the only cases in which the exception has been separately considered, where wear and tear was defined as meaning the dilapidations caused by certain destructive agencies rather than those agencies themselves. In my opinion, such words as "fair" and "reasonable" in an exception of this kind qualify both the destructive agencies and also the dilapidation which they bring about.

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(1) (1880) 5 C. P. D. 507, 513.

(2) 17 Times L. R. 570.

Such words can be used no doubt to qualify human user, but they could not be used to qualify forces of nature. It would be impossible to speak of an "unfair rain" or an "unreasonable frost." To bring dilapidations within the protection of such an exception as that in this case, I think that two things must be shown: First, that the dilapidations for which exemption is claimed were caused by normal human use or by the normal action of the elements, and, secondly, that they are reasonable in amount, having regard to the terms of the contract to repair the premises and the other circumstances of the case. In the present case there was an omission to repair for a very long period of time. For forty-two years the widow was tenant in possession, and failed to take any steps to counteract the natural process of decay. On those facts I have some difficulty in holding that these dilapidations were not caused by reasonable wear and tear, but I am quite clear that they are not reasonable wear and tear on the ground that they are altogether unreasonable in amount and inconsistent with the plain intention of the testator.

For these reasons I am of opinion that the official referee was right and that the appeal fails.

TALBOT J. read the following judgment: The plaintiffs are trustees of the will of William Leach, who died in November, 1884. The defendants are executors of his widow, who was tenant for life under his will of a house and premises in Salisbury. She died in February, 1926. The devise provided for repairs of the premises by the tenant for life as follows: "She . . . . keeping the same in good repair and condition (reasonable wear and tear excepted)." She was also bound to insure against fire in the names of the trustees of the will. The effect of the words set out is that having accepted the devise and enjoyed the property she is bound in equity by the condition under which it was left to her as if she had covenanted in the same terms.

The action was brought by the trustees to recover damages from her estate for alleged breaches of the condition and was tried by one of the official referees. The course which the trial took was that after evidence for the plaintiffs and argument as to the construction of the condition in the will, figures were agreed as those for which the judgment should be given respectively according as the official referee adopted one or other of the rival contentions. He adopted that of the plaintiffs, and gave judgment accordingly for 550*l*. If the defendants are right, the agreed figure is 97*l*. These figures were compromise figures, and do not represent any exact calculation. It is perhaps unfortunate that the official referee does not state very precisely the two constructions of which he chose one. Roughly I think it comes to this. The plaintiffs said that, while the tenant for life was not liable for defects directly caused by wear and tear, the exception did not supersede the first part of the condition, and she was bound to do such repairs as were necessary to prevent damage, even if originally caused by wear and tear, from producing further damage; or (putting it somewhat differently) that damage caused by reasonable wear and tear meant damage so caused by a tenant who acted reasonably. The defendants said that as to any damage caused by reasonable wear and tear the tenant for life was entitled to do nothing, simply to be inactive, whatever may be the consequences to the property. It is scarcely too much to say that as to this class of damage the result is to leave the tenant for life liable for voluntary waste only, to which she would be liable without any express condition. On the other hand, it is true that the plaintiffs' surveyors admitted that for all practical purposes they had disregarded the exception altogether. It is obviously the duty of the Court to give effect if possible to the whole of the condition and exception and, bearing this in mind, I will state what is, in my opinion, its true construction, which must, I think, be the same as of like words in a covenant in a lease.

The meaning is that the tenant (for life or years) is bound to keep the house in good repair and condition, but is not liable for what is due to reasonable wear and tear. That is to say, his obligation to keep in good repair is subject to that exception. If any want of repair is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear must be construed as limited to what is directly due to wear and tear, reasonable conduct on the part of the tenant being assumed. It does not mean that if there is a defect originally proceeding from reasonable wear and tear the tenant is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. He is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce.

For example, if a tile falls off the roof, the tenant is not liable for the immediate consequences; but, if he does nothing and in the result more and more water gets in, the roof and walls decay and ultimately the top floor, or the whole house, becomes uninhabitable, he cannot say that it is due to reasonable wear and tear, and that therefore he is not liable under his obligation to keep the house in good repair and condition. In such a case the want of repair is not in truth caused by wear and tear. Far the greater part of it is caused by the failure of the tenant to prevent what was originally caused by wear and tear from producing results altogether beyond what was so caused. On the other hand, take the gradual wearing away of a stone floor or staircase by ordinary use. This may in time produce a considerable defect in condition, but the whole of the defect is caused by reasonable wear and tear, and the tenant is not liable in respect of it.

It has been said both in reported cases and in text-books that there is strangely little authority on the construction of this familiar exception. What authority there is is for the most part in summings up at nisi prius or in short and imperfect reports of judgments. I know of no case which is at all inconsistent with what is said above. Indeed it appears to me that our judgment in this case is to a considerable extent supported by *Manchester Bonded Warehouse Co.* v. *Carr.* (1) In *Terrell* v. *Murray* (2) there appears to have been no evidence at all of any defect in the painting not directly due to reasonable wear and tear in the sense explained above, and the tenant was accordingly held to be protected by the exception from any liability in respect of painting. The view which I take of the liability of the tenant for life being in substance that submitted by the plaintiffs and adopted by the learned official referee, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Elvy Robb & Welch, for Turner, Turner & Martin, Ipswich.*

Solicitors for defendants: *Taylor, Jelf & Co., for Wilson & Sons, Salisbury.*

F. C.

1928
Jan. 20.

FOREMAN AND ELLAMS, LIMITED *v.* BLACKBURN.

Sale of Goods—C.i.f. Contract—Goods shipped before Contract—Bill of Lading issued after Goods shipped—Steamer visiting other Ports in meantime—Fulfilment of Contract.

A contract dated July 2, 1926, provided for the sale of a quantity of frozen rabbits and their shipment from Sydney c.i.f. Liverpool by a named steamer to sail during August. The bill of lading, which was dated August 17, 1926, stated that the goods had been shipped by the steamer, then lying in Sydney. The steamer shipped the goods or the bulk of them at Sydney on June 25, 1926, when she proceeded to Queensland ports, thereafter returning to Sydney, and finally sailing from that port for Liverpool on August 17, 1926. The buyers declined to take delivery of the goods and the sellers claimed damages from them for breach of contract. On a case stated by an arbitrator:—

Held, that the sellers were not entitled to recover, inasmuch as they had themselves committed breaches of the contract, by supplying goods the shipment of which had already taken place before the date of the contract of sale, and by tendering a bill of lading the issue of

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(1) 5 C. P. D. 507.

(2) 17 Times L. R. 570.

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Foreman and Ellams, Ld. v. Blackburn.

which had been delayed for so long as seven weeks after the shipment, the steamer having in the meantime visited other ports several hundred miles from the port of shipment.

Hansson v. *Hamel & Horley, Ld.* [1922] 2 A. C. 36, observations applied.

Special Case stated by an arbitrator.

By a contract in writing dated July 2, 1926, Messrs. Foreman & Ellams, Ld. (hereinafter called "the sellers"), sold to Mr. Christopher Blackburn (hereinafter called "the buyer") 1000 crates (5 per cent. more or less) of frozen furred rabbits on the following terms: "Description: N. S. W. frozen furred rabbits packed not earlier than May not later than July. Price: 36*s.* per crate c.i.f. Liverpool. Shipment: (With all liberties as per bill of lading) per *Suffolk* due to sail during August to Liverpool. Payment: Nett cash against documents on steamer and/or steamers . . . . each shipment to be considered a separate contract. . . . . Any dispute arising under this contract to be settled by private treaty if possible . . . . subject to the provisions of the Arbitration Act, 1889."

On August 17, 1926, the *Suffolk*, having loaded 1011 crates of frozen rabbits, sailed from Sydney for Liverpool. On November 25, 1926, the sellers tendered the shipping documents to the buyer. It was the custom in the frozen rabbit trade for the seller to tender to the buyer with and in addition to the usual c.i.f. documents either a freezing certificate or a document equivalent thereto. The documents tendered by the sellers to the buyer included a bill of lading and two freezing certificates.

The bill of lading, which was dated August 17, 1926, stated that there had been shipped "in apparent good order and condition by the steamship *Suffolk* now lying in Sydney" 1011 crates hard frozen rabbits; and contained a deviation clause giving liberty either before or after proceeding towards the port of discharge to proceed to and stay at and/or return to any ports or places whatsoever either in a contrary direction or not. The freezing certificates showed that the goods were shipped per steamship *Suffolk* to Liverpool on June 25, 1926, and August 17, 1926.

The buyer wrote to the sellers asking when and where the shipment took place, and he received in reply a letter from the sellers informing him that the whole of the goods were loaded direct into the *Suffolk* on June 25, 1926, and that the steamer then proceeded to Queensland ports and returned to Sydney, finally sailing from that port on August 17, 1926. The buyer refused to take up the shipping documents, or to take delivery of or pay for the goods, which were thereupon by agreement between the parties sold for the best price obtainable but at a loss of 534*l.* 15*s.* 8*d.*

The sellers claimed the last mentioned sum from the buyer as damages for breach of contract, but the buyer on various grounds, denied his liability to pay that sum.

In February, 1927, the parties by agreement referred their disputes to an arbitrator. The arbitrator found the facts mentioned above, but he did not find in terms that the steamer was ever due to sail during August, 1926, to Liverpool with goods of the contract description upon her.

The arbitrator made his award in the form of a special case as follows:—

He decided, subject to the opinion of the Court, that the buyer was guilty of default in refusing to take up and pay for the documents and that the sellers were entitled to the sum of 534*l.* 15*s.* 8*d.* from the buyer for damages for breach of contract.

If he was right in law in so deciding, then he awarded: (1.) that the buyer should pay to the sellers the above sum, (2.) that the expenses of the arbitration should be borne by both parties equally, and (3.) that the parties should each bear their own costs of the arbitration.

If he was wrong in law in so deciding then he awarded: (1.) that the sellers should recover nothing from the buyer, (2.) that the expenses of the arbitration should be borne by the sellers, and (3.) that the parties should each bear their own costs of the arbitration.

Raeburn K.C. and *N. J. Laski* for the buyer.

G. J. Lynskey for the sellers.

WRIGHT J. This is a case of a somewhat unusual character. The facts on which the point arises may be very shortly stated. [His Lordship stated the facts substantially as above set out, reading the relevant portions of the contract of sale, the bill of lading, and the other documents, and continued as follows:] On these facts the arbitrator decided in favour of the sellers. The buyer contends that the sellers are not entitled to recover, because they did not fulfil the contract. I have to consider whether the contract has been fulfilled by the sellers. In my opinion it has not. I think that the tender which they made was not good.

In the first place it appears from the freezing certificate, which is a material document, that before the date of the contract either the goods or some part of the goods had been already shipped. Whether that is true of all or only some of the goods is immaterial, because on a sale of goods all goods tendered must correspond with the contract description, and the fact that some do correspond whereas others do not does not make the tender good. I consider that the word "shipment" in the contract must be understood as referring to shipment in the future and that it is entirely inapt as referring to a shipment which at the date of the contract, namely July 2, 1926, had already, in whole or in part, taken place.

In addition to that, I consider that the bill of lading was not a good shipping document, and was not in proper regular form. It appears from the relevant documents that as regards some part at least of the goods the shipment had taken place not less than seven weeks before the date of the bill of lading, and that in itself was a fact which could properly lead to inquiry and call for explanation. It was also apparent and is not contested that in that interval of time the ship had proceeded from Sydney to a number of ports in North Queensland, and had then returned to Sydney, and that it was during her second stay at Sydney that the bill of lading was issued. It is true that, though a bill of lading must be issued on shipment, some latitude of time has been allowed. I have been referred to some observations by Lord Sumner, in the case of *Hansson* v. *Hamel & Horley, Ld.* (1) In that case Lord Sumner, after mentioning that Scrutton J. had pointed out in *Landauer & Co.* v. *Craven* (2), that in a sale of goods c.f. and i., the contract of affreightment must be procured "on shipment," went on to say: "I do not understand this proposition as meaning that bill of lading would be bad, unless it was signed contemporaneously with the actual placing of the goods on board. 'On shipment' is an expression of some latitude. Bills of lading are constantly signed after the loading is complete and, in some cases, after the ship has sailed. I do not think that they thereby necessarily cease to be procured 'on shipment,' nor do I suppose that the learned judge so intended his words. It may also be that the expression would be satisfied, even though some local carriage on inland waters, or by canal, or in an estuary by barge or otherwise, preceded the shipment on the ocean steamer, provided that the steamer's bill of lading covered that prior carriage by effectual words of contract. 'On shipment' is referable both to time and place. In principle, however, subject to what I have said, I accept this opinion of so great an authority, and I am quite sure that a bill of lading only issued thirteen days after the original shipment, at another port in another country many hundreds of miles away, is not duly procured 'on shipment.'" (3) These observations do not cover this case. In fact, I have never before known such a case as this. I am prepared, however, to hold, and I do hold, that a bill of lading is not regular if it is issued, though at the port of original loading, only seven weeks after the original loading of the cargo or some portion of it has taken place, after the vessel has left the port of loading and sailed some hundreds of miles to other ports, and has then come back to the original port of loading. I think that a bill of lading issued in such circumstances as these is not a good bill of lading. If it becomes apparent on the evidence, as I think it does, that

(1) [1922] 2 A. C. 36.

(2) [1912] 2 K. B. 94.

(3) [1922] 2 A. C. 36, 47.

these were the facts of the present case, then having regard to the prima facie meaning of "bill of lading," I think the buyer was entitled to reject on having tendered to him as a bill of lading a document which was issued so long after the goods were shipped.

Looking at the form of the bill of lading in this particular case, I see that it states "shipment on the S.S. *Suffolk* now lying in Sydney." I should have thought that that meant, according to the ordinary use and understanding of language, that the shipment had taken place at Sydney during the then stay of the vessel at Sydney. The vessel might no doubt have remained at Sydney for some weeks and shipment might have been going on during that time. I think, however that, according to the ordinary understanding, that document is not correctly applicable to a case where shipment had not taken place during the then stay of the vessel at Sydney but where a substantial quantity of the shipment at any rate had taken place during her previous stay at Sydney. There would seem to have been some earlier documents in existence to represent the shipment during the intermediate period, but we have to deal with the final bill of lading, and I think that it is not properly and correctly applicable to that earlier shipment. That is another ground on which I think the document is not in order.

There is one further point. The arbitrator has not found that the *Suffolk* was at the date of the contract of sale due to sail in August to Liverpool. We know she sailed in June to some other place, that she came back to Sydney at some time which is not specified, and that on August 17 she did sail to Liverpool; but there is no finding that she ever had goods of the contract description due to sail during August to Liverpool.

On all those grounds I think the award of the arbitrator in which he finds that damages are to be paid to the sellers is wrong, and ought not to stand, and I direct that his alternative finding shall be the operative award between the parties. That is, in effect, that the sellers recover

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nothing from the buyer, and that the various fees and expenses are to be borne and paid by the sellers.

Appeal allowed.

Solicitors for buyer: *Leonard Bingham & Sharp, for Harry T. Sales, Manchester.*

Solicitor for sellers: *Edward Lloyd, Liverpool.*

J. R.

1928
Feb. 6, 9.

C. SIMEONS AND COMPANY, LIMITED *v.* TRUSTEE OF THE PROPERTY OF EUGENE DURAND (A BANKRUPT).

[1927. C. 3657.]

Bankruptcy—Reputed Ownership—"Goods . . . in the possession, order or disposition of the bankrupt . . . . by the consent . . . . of the true owner"—Goods at Commencement of Bankruptcy in Possession of Wharfinger in Name of and to Order of Agent of Bankrupt—Delivery Order in Hands of Buyers—Conduct of Buyers in leaving Goods with Wharfinger—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 38 (*c*).

The bankrupt, who carried on business as a merchant, had for some years dealt with the plaintiffs in vacuum flasks, which came from Germany. The bills of lading in respect of the goods were made out "to order" and the charges were paid by S., a forwarding agent employed by the bankrupt. The goods on arrival were stored at a wharf in the name, and for the account, of S. When a sale had taken place S. signed a delivery order which the bankrupt handed to the buyers against payment for the goods. Between August 3 and September 7, 1927, the plaintiffs purchased a number of cases of vacuum flasks and paid the bankrupt for them prior to the commencement of the bankruptcy, the receiving order being made on September 24. The bankrupt, upon payment being made for the goods, handed to the plaintiffs delivery orders for the goods signed by S. and addressed to the wharfingers. These delivery orders had not been presented at the wharf at the date of the bankruptcy, and when they were presented shortly afterwards the wharfingers, acting on S.'s instructions, refused to deliver the goods. The trustee in bankruptcy claimed that the goods were in the possession, order or disposition of the bankrupt at the date of the receiving order and therefore formed part of the bankrupt's estate under s. 38 (*c*) of the Bankruptcy Act, 1914:—

Held, that the plaintiffs had not by their conduct in any way induced a belief that these goods were in the possession, order or disposition of the bankrupt under such circumstances that he was the reputed owner thereof, and therefore the trustee was not entitled to the goods as forming part of the bankrupt's estate.

TRIAL of an issue before Finlay J.

The bankrupt, Mr. Eugene Durand, carried on business for a good many years as a merchant under the name of C. Melin & Co. On September 24, 1927, a receiving order was made against him on his own petition, and on the same day he was adjudicated bankrupt.

For some time he had done business with the plaintiffs in vacuum flasks, which were forwarded in cases from Germany, being shipped at Hamburg. The method of business was as follows: The bill of lading was made out "to order," and the charges were paid by Mr. Leslie Smith, a forwarding agent, who was employed by Mr. Durand for the purpose of dealing with these goods. The goods on arrival were stored at the Free Trade Wharf in the name of and for the account of Mr. Leslie Smith. When Mr. Durand had negotiated a sale to the plaintiffs, he asked Mr. Leslie Smith for a delivery order. He then handed the delivery order to the plaintiffs against payment for the goods, which was usually made by acceptances at four months' date, although in one or two instances payment was by cheque. The plaintiffs sometimes left the goods for a considerable period in store at the wharf, but the price paid by the plaintiffs included the charges for rent, insurance and cartage to plaintiffs' warehouse; in fact, all charges until delivery was claimed by the plaintiffs.

Between August 3 and September 7, 1927, the plaintiffs purchased five consignments of forty cases each of vacuum flasks from C. Melin & Co., under which name Durand traded, and they had paid for them by cheque and acceptances prior to the date of Durand's bankruptcy. Upon payment being made for the goods, C. Melin & Co. delivered to the plaintiffs delivery orders signed by Mr. Leslie Smith and addressed to the superintendent of the Free Trade Wharf in respect of the cases comprised in each purchase. These delivery orders had not been presented at the wharf at the date of Durand's bankruptcy, with the result that the goods were still lying at the wharf to the order of Mr. Leslie Smith. On September 29, after the bankruptcy of Durand, the plaintiffs endeavoured to obtain the goods from the Free Trade Wharf,

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but the wharfingers, acting on Mr. Leslie Smith's instructions, refused to part with the goods.

The plaintiffs thereupon brought an action against Mr. Leslie Smith in which they claimed delivery up of the 200 cases of vacuum flasks. Mr. Leslie Smith, in answer to the action, disclaimed any interest in the goods other than for his charges for customs' clearances, freight and warehousing of the goods in respect of which he claimed a lien on the goods. The trustee of the estate of Durand, however, made a claim in the action, alleging that the goods, the subject of the action, were in the possession, order or disposition of the bankrupt at the time of the receiving order, and he accordingly claimed them as forming part of the bankrupt's estate.

An order was made by a Master directing that all further proceedings in the action against Leslie Smith should be stayed, and directing that an issue should be tried between the plaintiffs and the claimant to decide whether the 200 cases of vacuum flasks were the property of the claimant as against the plaintiffs.

Clayton K.C. and *Phineas Quass* for the claimant. These goods admittedly did not belong to the bankrupt at the commencement of the bankruptcy, because the property in them had passed to the plaintiffs, and therefore no question arises under s. 38, para. (*a*), of the Bankruptcy Act, 1914. The question is whether they were, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent of the true owner, under such circumstances that he was the reputed owner thereof, within the meaning of s. 38, para. (*c*), of that Act. (1) It is not necessary that the goods should have been in the bankrupt's actual possession; it is sufficient if the goods were in the possession of his agent or servant: see Halsbury's Laws of England, vol. ii., sect. 283. Smith had possession of the goods, or rather they were in his order or disposition as the agent of the bankrupt. He described himself upon his notepaper as "shipping agent," and therefore prima facie the goods could not have been in his own reputed ownership. In *Jones* v. *Dwyer* (1) the purchaser of goods, lying at a wharf in the name of the seller, received from him at the time of the sale an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller for several months; hearing of the seller's probable insolvency the purchaser took the delivery order to the wharfinger and had the goods transferred into his own name nine days before the seller actually became bankrupt, and it was held that the assignees of the bankrupt were not entitled to the goods, because there was a complete transfer of possession before bankruptcy. There both the demand for, and the transfer of, possession were before the commencement of bankruptcy, but in the present case the demand by the plaintiffs for possession of the goods was not made until five days after the commencement of the bankruptcy. The present case is covered by the decision in *Ex parte Bolland.* (2) In that case goods were left in a bonded warehouse by the purchaser and were not transferred into his name in the books of the warehouse keeper, and it was held that they were within the order and disposition of the vendor, notwithstanding that the transaction was entered in the stock and bond books of the vendor in the name of the purchaser by distinctive marks and figures, and that the vendor in the warrant given by him at the date of the purchase acknowledged that the goods were held by him to the order of the purchaser. 21 Jac. 1, c. 19, s. 11, made any goods or chattels in the "possession, order and disposition" of the bankrupt with the consent and permission of the true owner, liable to pay his debts. That was altered by 6 Geo. 4, c. 16, s. 72, to any goods or chattels in the "possession, order or disposition" of the bankrupt, and therefore it is sufficient if goods are in the order or disposition of the bankrupt although they are not in his possession. If goods are in the possession of an agent and he becomes insolvent

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(1) The Bankruptcy Act, 1914, s. 38. The property of a bankrupt shall comprise (para. (*c*)) "all goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof. . . ."

(1) (1812) 15 East, 21.

(2) (1873) 28 L. T. 43.

the property in the goods will still remain in the owner of the goods and will not pass to the trustee of the estate of the agent as being in his reputed ownership.

Tindale Davis and *Harry Atkins* for the plaintiffs. Having regard to the evidence in this case these goods were not in the order or disposition of the bankrupt at the commencement of the bankruptcy. The cases relied upon by the claimant have no bearing upon the facts of this case. In *Ex parte Bolland* (1) the vendors and the warehousemen were one and the same persons and therefore the goods were in the possession, order or disposition of the bankrupt. The judgment in that case in fact proceeded upon a question as to custom which does not arise here. In the present case the goods were never in the name of the bankrupt at any time, the bill of lading being made out "to order" only and not in the name of the bankrupt and the goods being stored at the wharf in the name and for the account of Smith and not of the bankrupt. The orders which were given for the delivery of the goods were neither signed by the bankrupt nor addressed to him; they were in fact signed by Smith and addressed to the wharfingers. If there was any reputation here it was that the goods were in the reputed ownership of Smith, because they were deposited at the wharf in his name. The principle that governs the construction of the reputed ownership section of the Bankruptcy Act, 1914, that is s. 38 (*c*), was stated by James L.J. in *Ex parte Wingfield* (2) as follows: "The section must, however, be read, as the similar provision in the bankruptcy statutes from the time of James I. has always been read, with some attention to common sense. It has always been construed as meaning this: that if goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit. But, if no such credit has been given, then the maxim applies, Cessante ratione cessat ipsa lex."

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(1) 28 L. T. 43.

(2) (1879) 10 Ch. D. 591, 594.

Vaughan Williams L.J. also stated the principle applicable in giving the judgment of the Court of Appeal in *In re Watson & Co.* (1) in the following terms: "In our opinion it is essential before a Court can hold that one man's goods are to be taken to pay another man's debts, because of the reputation of ownership of the bankrupt, that the goods should be held and dealt with by the bankrupt in such manner and under such circumstances that the reputation of ownership must arise . . . . the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt. . . . This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise." In the present case these goods were not held and dealt with by the bankrupt in such manner and in such circumstances that the reputation of ownership by the bankrupt must arise. Smith was not merely the agent of the bankrupt, because he claimed a lien on the goods as bailee. The fact that Smith paid the wharfingers' charges and reimbursed himself by charging the bankrupt does not make the goods in the order or disposition of the bankrupt. The delivery orders were signed by Smith and delivered to the plaintiffs before the commencement of the bankruptcy. That operated as constructive delivery of the goods to the plaintiffs.

Clayton K.C. in reply. It is immaterial to whom the goods belonged; the material question is in whose possession, order or disposition they were. In the present case the goods were in the possession of the wharfingers in the name and to the order of Smith, who was merely the agent of the bankrupt. The mere fact that goods are in the possession of the bankrupt's agent or servant will not take them out of the bankrupt's reputed ownership: see Robson's Bankruptcy,

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(1) [1904] 2 K. B. 753, 756.

7th ed., p. 521. The goods need not be in the actual possession of the bankrupt himself; constructive possession is sufficient. The possession of a servant is for this purpose the possession of the bankrupt: see Williams' Bankruptcy Practice, 13th ed., p. 274. An agent is merely the alter ago of his principal and what is in his order and disposition is in the order or disposition of his principal. Every one knew that Smith was merely holding the goods as agent for the bankrupt, and therefore the goods could not have been in Smith's reputed ownership. In *Ex parte Wingfield* (1) it was the agent and not the principal who went bankrupt, and the decision in that case was that where an agent becomes insolvent the goods in his possession as agent are not in his order or disposition so as to make the insolvent agent the reputed owner thereof. In *Harris* v. *Truman* (2) a person who was employed by brewers as a malting agent became insolvent and it was held that the property in certain barley and malt which were upon the premises of the malting agent had vested in the brewers and that the barley and malt were not in the order and disposition of the insolvent agent as the reputed owner thereof. But where goods are in the name of the agent and the principal becomes bankrupt the goods are in the order and disposition of the principal and not of the agent. The object of the reputed ownership clause in the Bankruptcy Act, 1914, is to prevent false credit being given, but if goods are in the order or disposition of the bankrupt it is no answer to say that false credit was not in fact obtained. In *Hoggard* v. *Mackenzie* (3) it was held that the possession of goods by the agent of a firm which had become bankrupt was the possession of the bankrupts and that therefore the order and disposition clause applied. In the present case the plaintiffs, up to the date of the receiving order, were consenting that the goods should remain at the Free Trade Wharf in the name of Smith who, to their knowledge, was merely acting as the agent of Durand, and therefore they were consenting to the goods being in the order or disposition of Durand at the commencement of his bankruptcy. Mellish L.J. said in *Ex parte Ward* (1): "It is clear law, as laid down in *Smith* v. *Topping* (2) and other cases, that if the true owner bona fide demands possession with a view of taking possession before the bankruptcy, though from no fault of his own he fails to get it, the goods are not within the possession of the bankrupt with his consent." In the present case, however, there was no demand by the plaintiffs for possession of these goods before the bankruptcy, although the plaintiffs had in their possession delivery orders in respect of the goods by which they could at any time have got the goods from the wharf, nevertheless they left them there in the name of the bankrupt's agent, and therefore the goods were in the order or disposition of the bankrupt at the commencement of his bankruptcy.

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(1) 10 Ch. D. 591.
(2) (1882) 9 Q. B. D. 264.
(3) (1858) 25 Beav. 493.

Tindale Davis in reply on the cases. The decision in *Harris* v. *Truman* (3) proceeded on notorious custom rather than upon the question whether the goods were in the order or disposition of the bankrupt. The decision in *Ex parte Ward* (4), when the facts are looked at, is in my favour. There the purchaser had paid the vendor, who afterwards became bankrupt, for certain goods, and later had demanded possession of the goods, and it was held that those goods did not pass to the trustee in bankruptcy as being in the bankrupt's order and disposition, as the consent of the true owner had been determined by the demand of possession. Even assuming that Smith was the agent for the bankrupt so as to give the bankrupt a constructive possession of the goods, that constructive possession came to an end when the delivery orders with regard to the goods were issued by Smith, and from that date the constructive possession of the goods was in the plaintiffs.

Cur. adv. vult.

Feb. 9. FINLAY J. read the following judgment: This case, which is an issue directed by a Master, raises a question

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(1) (1872) L. R. 8 Ch. 144, 148.
(2) (1833) 5 B. & Ad. 674.
(3) 9 Q. B. D. 264.
(4) L. R. 8 Ch. 144.

1928

C. SIMEONS & Co. v. DURAND'S TRUSTEE.

Finlay J.

on s. 38, para. (*c*), the sub-section relating to reputed ownership, of the Bankruptcy Act, 1914. By that section the property of a bankrupt is to comprise, among other things, "all goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof."

Evidence both oral and documentary was laid before me, and the facts, as to which there was little, if any, dispute, are as follows. The bankrupt was Mr. Eugene Durand, who had for a good many years carried on business as a merchant under the name of C. Melin & Co. On September 24, 1927, a receiving order was made against him on his own petition, and his bankruptcy accordingly dates from that day. He had for some time done a considerable business with the plaintiffs in vacuum flasks. These flasks were forwarded in cases from Germany, forty cases a week, and it was the practice of Mr. Durand to sell these cases to the plaintiffs sometimes before and sometimes after their arrival in this country. The cases were shipped from Hamburg, and the method of business was this: the bill of lading was made out "to order" and the charges were paid by Mr. Leslie Smith, who is, it appears, a forwarding agent, and who was employed by Mr. Durand for the purpose of dealing with these goods. The goods on arrival were stored at the wharf in the name of and for the account of Mr. Leslie Smith. When Mr. Durand had negotiated a sale to the plaintiffs he, either in writing or by word of mouth, asked Mr. Leslie Smith for a delivery order. Having got the delivery order he would hand it over to the plaintiffs against payment for the goods. Payment was made in one or two instances by cheque, but more usually by acceptances at four months' date. It was the practice of the plaintiffs to leave the goods, sometimes for considerable periods, in store at the wharf and the charges for rent, for insurance and for carriage on delivery were borne by the bankrupt. A schedule showing details of a long series of transactions between Mr. Durand, the bankrupt, and the plaintiffs was put in before me. The question before me relates to the first five items in this schedule. With regard to all these five consignments, the goods duly identified had been bought by the plaintiffs and payment had been made by acceptance or cheque prior to the date of the bankruptcy. It was thus in the power of the plaintiffs at any time to obtain delivery of the goods to them by presenting the delivery orders, but in fact delivery orders had not been presented at the wharf in respect of these consignments at the date of the bankruptcy. The result was that the goods were still lying at the wharf to the order of Mr. Leslie Smith. After the bankruptcy the plaintiffs endeavoured to obtain the goods, but the wharfingers, acting on Mr. Leslie Smith's instructions, refused then to part with them.

It was admitted before me that the property in the cases had passed to the plaintiffs, with the result that s. 38, para. (*a*), has no application, but it was contended that the trustee in bankruptcy was entitled to claim the cases by virtue of s. 38, para. (*c*). A considerable number of authorities were cited to me upon the proper construction of this subsection. I desire to quote only two passages. In *Ex parte Wingfield* (1) James L.J. said this: "The section must, however, be read, as the similar provision in the bankruptcy statutes from the time of James I. has always been read, with some attention to common sense. It has always been construed as meaning this: that if goods are in a man's possession, order, or disposition, under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain that false credit is to suffer the penalty of losing his goods for the benefit of those who have given the credit. But, if no such credit has been given, then the maxim applies, Cessante ratione cessat ipsa lex."

In *In re Watson & Co.* (2) Vaughan Williams L.J., in delivering the judgment of the Court of Appeal, said this: "The doctrine of reputed ownership was first embodied in the Bankruptcy Act, 21 Jac. 1. It has been couched in

(1) 10 Ch. D. 591, 594.

(2) [1904] 2 K. B. 753, 757.

various words in the successive bankruptcy statutes, but this principle has run through them all, and the statement of Lord Redesdale in *Joy* v. *Campbell* (1) (a case which has been approved and acted on again and again: see *Belcher* v. *Bellamy* (2); *Hamilton* v. *Bell* (3), and many other cases), that the true owner must have unconscientiously permitted the goods to remain in the order or disposition of the bankrupt, justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might or might not) arise: see *Hamilton* v. *Bell* (3); *Gibson* v. *Bray* (4); *Ex parte Bright.* (5) The question for us then is: Did Messrs. Atkin consent to the possession by the bankrupts, Messrs. Watson, under such circumstances that customers were entitled to assume that Messrs. Watson were the owners of the goods in their trade or business?"

These passages lay down the general principles applicable, and it is necessary, applying those principles, to decide upon the facts of each particular case as it arises whether the reputed ownership section applies. In this case I have come to the conclusion that I ought not to hold that these goods of the plaintiffs were in the possession or disposition of the bankrupt under such circumstances that he was the reputed owner thereof. I do not doubt that Mr. Leslie Smith must, as between himself and the bankrupt, be regarded as an agent of the bankrupt, nor do I doubt that for the purpose of the matters I have to consider goods may be in the reputed ownership of a principal although physically in the possession of an agent, but the essential point seems to me to be this, whether the result of what has happened would be that persons having dealings with the parties must draw the inference that the goods were the property of the bankrupt with the result that the bankrupt would be enabled by reason of such reputed ownership to obtain false credit. Here the goods were physically in the possession of the wharfingers and they were held by them to the orders of Mr. Leslie Smith. The delivery order, which is, of course, a document of title, was in the hands of the plaintiffs. In these facts it would, I think, be wrong to hold that the plaintiffs have by their conduct in any way induced a belief that these goods were in the possession, order or disposition of the bankrupt under such circumstances that he was the reputed owner thereof. Many variations in the facts may be put and some were suggested in the course of the argument before me. My decision must necessarily be limited, as every decision on a question of this sort must be limited, to the facts of the case before me, and on those facts, applying the principles of law as I understand them, I decide in favour of the plaintiffs.

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(1) (1804) 1 Sch. & Lef. 328, 336.

(2) (1848) 2 Ex. 303.

(3) (1854) 10 Ex. 545.

(4) (1817) 8 Taunt. 76.

(5) (1879) 10 Ch. D. 566.

Judgment for plaintiffs.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for claimant: *De La Chapelle, Thirlby & Co.*

R. F. S.

1928
March 7.

ATTORNEY-GENERAL *v.* GUY MOTORS, LIMITED.

Revenue—Income Tax—Information—Claim by Crown—Right of Taxpayer to set off—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 39, *sub-s.* 1—*Rules of Supreme Court, Order* XIX., *r.* 3—*Order* LXVIII., *r.* 1 (*c*).

In proceedings by information on the Revenue side of the King's Bench Division claiming payment of income tax, the taxpayer cannot set off a debt due to him from the Crown.

DEMURRER to a reply by the respondents to an information by the Attorney-General claiming payment of certain sums as income tax and corporation profits tax.

The respondents, Guy Motors, Ld., did not dispute their liability in respect of their assessments in these sums, but pleaded that they were entitled to set off against the above claims the balance of certain sums in respect of refunds of tax which they alleged were due to them under an agreement with the Revenue authorities of March, 1924.

The Attorney-General demurred to the above plea, alleging that there could be no set-off against the Crown in these proceedings.

R. P. Hills (*Sir Douglas Hogg A.-G.* with him) for the Crown. There can be no set-off against the Crown. If s. 39 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), which now, with Order XIX., r. 3, of the Rules of the Supreme Court, regulates set-off, was binding on the Crown, the prerogative would be abridged, for by reason of the prerogative the original Statute of Set-off (2 Geo. 2, c. 22) was always treated as not binding on the Crown, and the old practice is to continue if not inconsistent with the Act of 1925 (s. 103). Therefore it is not so binding: see Chitty's Prerogatives of the Crown, p. 383. The rule is that the subject cannot claim from the Crown except by petition of right, and to allow the respondents to get the benefit of their claim by setting it off would be, in effect, to get round that rule: see *Bombay and Persia Steam Navigation*

Co., v. *MacLay.* (1) It is against the policy of the income tax Acts that payment should be delayed pending litigation.

[He was stopped.]

Latter K.C. and *Sir Cassie Holden* for the respondents. The old rule that the Crown cannot be sued except by petition of right was not unnaturally logically applied to Revenue matters when the Statute of Set-off was in operation. But now that the whole matter of jurisdiction is dealt with by statute it is not necessary to fall back on the prerogative, which has gone: see *Food Controller* v. *Cork.* (2) The old Court of Exchequer, before which Revenue cases were tried, was not a statutory Court as is the High Court, which inherits its jurisdiction. If the Act of 1925 does not apply to the Crown, then the provisions of s. 96 which exclude the Crown from its operation in certain cases are superfluous. This is a "matter" within the definition in s. 225 of the Act of 1925, therefore the provisions of the Act are applicable thereto. If the Act is looked at as a whole it is reasonably plain that it was intended to include the Crown unless expressly or by necessary implication excluded. The position now is that the jurisdiction over Revenue cases is taken away from the old Court of Exchequer and a new statutory Court is set up to deal with the whole subject-matter, and the Crown cannot have recourse to this new Court without accepting its whole jurisdiction.

[*Attorney-General* v. *De Keyser's Royal Hotel, Ld.* (3), was also referred to.]

Sir D. Hogg A.-G. in reply. The reason why it was expressly stipulated in s. 96 of the Act of 1925 that the Crown should not be bound in cases before referees was that the Arbitration Act, 1889 (52 & 53 Vict. c. 49), was by s. 23 thereof made binding on the Crown. When it is intended that the Act of 1925 shall be binding on the Crown it is expressly so enacted, e.g., in s. 99, sub-s. 3. The right to set off now depends on Order XIX., r. 3, the old Statutes of Set-off

(1) [1920] 3 K. B. 402, 408. (2) [1923] A. C. 647.
(3) [1920] A. C. 508.

(2 Geo. 2, c. 22, and 8 Geo. 2, c. 24) being repealed by s. 4 of the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49). But by Order LXVIII., r. 1, "Nothing in these Rules, save as expressly provided, shall affect the procedure or practice in . . . . (*c*) Proceedings on the Revenue side of the King's Bench Division." As already stated, previous to the repeal of the Statutes of Set-off it had always been held that the Crown was not bound thereby, and that "procedure or practice" is not affected by the Rules.

In fact it is disputed by the Crown that money is due to the respondents under the agreement as alleged.

ROWLATT J. In this case the only question I have to decide is whether a set-off can be pleaded to an information. It seems to me that the Crown must be right in saying that it cannot, and for a very short reason. Either a set-off depends upon the Act of George II. or it does not. If it does it has always been stated in books of authority, whether there be decisions to that effect or not, that that statute does not bind the Crown, and I am certainly not going to say otherwise. But in fact that statute is repealed, and the matter now stands on the Supreme Court of Judicature (Consolidation) Act, 1925, and Order XIX., r. 3, of the Rules of the Supreme Court. But by Order LXVIII., r. 1 (*c*), of the Rules, they do not apply to Crown proceedings. It seems to me that there is no way out of that. No doubt the Act applies to the Crown in some cases. It alters the name and constitution of the Courts in which the Crown finds itself. In that sense it does apply to the Crown, but not in any way, speaking generally, so as to affect the rights of the Crown. I think it right to point out that at the back of the apparently hard rule that there can be no set-off in this case against the Crown there lies this fact, that the subject cannot make good a claim against the Crown except in a particular way, and my decision merely shows that he cannot get round that by refusing to pay a debt to the Crown and then asserting his claim by setting it off. Income tax must be paid as assessed, and other considerations are not to be involved. I must give judgment on this demurrer for the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Pepper, Tangye & Co., for Pepper, Tangye & Winterton, Birmingham.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.

1928
March 6, 7.

FRANCE *v.* J. COOMBES AND COMPANY.

Master and Servant—Wages—Minimum Wage—Trade Board—Worker employed on Work of specific Trade and also on other Work—Presence on Employers' Premises during all working Time—Calculation of Wages—Trade Boards Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 32), *s.* 8—*Boot and Shoe Repairing Order.*

By the Trade Boards (Boot and Shoe Repairing) Order, 1919 (St. R. & O., 1919, No. 543), made by the Minister of Labour, the Trade Boards Acts were applied to the boot and shoe repairing trade, and in due course the trade board established for the trade fixed minimum rates of wages for managers and other classes of workers in the trade.

The appellant was engaged as the working manager of a branch boot and shoe repairing shop belonging to the respondents. During about half the time he was present at the shop he was actually engaged in repairing boots and shoes; during the remaining business hours he kept the books and accounts, sold goods by retail, had his meals and cleaned the shop and its fittings, as he was required to do by his agreement:—

Held, that in calculating the amount of the wages to which he was entitled, the appellant was not to be deemed to have been employed in boot and shoe repairing "during all the time during which he was present" at the respondents' shop, within s. 8 of the Trade Boards Act, 1918, because during part of that time he was "so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform."

Decision of MacKinnon J. [1928] 1 K. B. 457 affirmed.

APPEAL from a decision of MacKinnon J.

By an agreement in writing dated January 3, 1923, the plaintiff, a boot and shoe repairer, agreed to serve the defendants, a firm of boot and shoe repairers, as working manager of their branch shop at Openshaw, Manchester.

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Under that agreement he undertook to do (*a*) all kinds of boot repairing and other work required by the defendants and to devote the whole of his time, ability and attention to the defendants' business; . . . . (*c*) to be responsible for all moneys and goods of the defendants at the branch at which he was employed . . . .; (*d*) to render to the defendants all accounts as required; (*e*) to account for and pay over all moneys of the defendants as instructed or required; . . . . (*g*) to keep all business books and documents on the premises at which he was employed; (*h*) to keep open the branch shop and remain in attendance thereat during business hours; . . . . (*j*) not to sell leather, rivets, patching or other goods which were used in the repairing business of the defendants, but to sell only those goods which were known as "sundries" according to the list appearing in the "sundries order book." The agreement also provided for the payment by the defendants to the plaintiff of a wage of 2*l.* 18*s.* a week and certain bonuses. The service was terminable by seven days' notice given by either party to the agreement. During the currency of the agreement the defendants paid to the plaintiff the amount due to him under its terms.

By a document headed "Rules for Branch Managers," which was signed by the parties, it was provided that the business hours of the shop were to be from 8 A.M. to 7.30 P.M., except on Fridays, when they were to be from 8 A.M. to 8 P.M., and on Saturdays, when they were to be from 8 A.M. to 1 P.M. Meal times were to be from 12.30 to 1.30 P.M. and from 4.30 to 5 P.M. "Sundries" were not to be sold during meal times. The shop must be swept and the windows dusted and set out every morning before 10 o'clock and the windows washed inside and outside on Tuesdays and Fridays. Linoleum must be washed and the brass polished every Friday, and the shop floor, fittings, signs, etc., washed as often as required. All goods received must be checked immediately. Cash and tickets [for repairs] must be balanced and the day book entered up nightly. Cash must be kept in a safety till. Every week a balance-sheet must be completed and a stock and sundries sheet made out. The shop door must be kept open during business hours except during exceptionally cold or stormy weather, and the window must be dressed in a certain way.

By the Trade Boards (Boot and Shoe Repairing) Order, 1919 (St. R. & O., 1919, No. 543), made by the Minister of Labour under the Trade Boards Acts, 1909 and 1918, those Acts were applied to "the boot and shoe repairing trade, that is to say, the repairing wherever carried on of boots, shoes, slippers, and all kinds of leather footwear, including the making of bespoke handsewn, riveted or pegged leather footwear, but excluding the manufacture of leather footwear on a large scale, the repairing of saddlery and leather goods other than leather footwear and the retailing of leather footwear." The trade board established for the trade in due course fixed minimum piece-rates and time-rates for the industry, which rates were confirmed by the Minister.

A "manager" was defined by the trade board as "a worker who is employed in any branch of the trade specified in the Trade Boards (Boot and Shoe Repairing) Order, 1919, and . . . . (*b*) who (whether working alone or with any other worker), under the terms of his employment, in addition to any work which may be required of him as a journeyman, fits up or supervises the fitting up of the work, and has control of the repairing or making and technical direction thereof."

The general minimum time-rate fixed by the trade board for managers was 80*s.* per week of 48 hours, and was "subject to a proportionate reduction according as the number of hours of employment in any week is less than 48." For hours worked over 48 in a week there were overtime rates at time and a quarter and time and a half.

The plaintiff remained in the defendants' employment under the contract contained in the documents referred to for three years. After he left it he brought this action, claiming 363*l.* 10*s.* 6*d.*, balance of wages due to him under the Trade Boards Acts on the ground that he was entitled to be paid the applicable minimum wage in respect of all the time during which he was present at the defendants' shop. The defendants denied liability, and said that they had

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paid to the plaintiff the full wages due to him under the agreement of January 3, 1923, and that he was estopped from contending that he was entitled to any further sum.

MacKinnon J. found as facts that the primary purpose of the defendants' shop was to repair boots and shoes, but that there was also a retail business of selling "sundries," i.e., not ready-made boots and shoes, but blacking, laces and goods of that character. The plaintiff spent about half the time during which he was present at the shop in actually repairing boots and shoes, and during the other half he was engaged in selling "sundries," cleaning the shop and fittings, keeping the books and accounts, and performing other duties specified in his contract. During meal times he would take refreshment not without interruption by customers bringing in or calling for boots and shoes. Every night he rendered an account of the number of hours which he had worked during the day at actual boot and shoe repairing. In the weekly balance-sheet there was shown "manager's earnings," which indicated the amount of piece-work earnings for repairing boots and shoes earned by the plaintiff during the week. These were based on the piece-work rates fixed under the Trade Boards Acts, 1909 and 1918, and were paid to the plaintiff by the defendants.

Upon these findings MacKinnon J. held that, in calculating the amount of the plaintiff's wages, the plaintiff was not to be deemed to have been employed in boot and shoe repairing "during all the time during which he was present" at the defendants' shop within s. 8 of the Trade Boards Act, 1918, because during part of that time he was "so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform." The judge accordingly held that the plaintiff's claim failed.

The plaintiff appealed.

Schiller K.C. and *Hilbery* for the appellant. MacKinnon J. was wrong in holding that the appellant was not entitled to recover. In effect the judge has cut the agreement of service into two parts and said that one part only related to the appellant's work at the repairing bench, the other relating to his work in looking after the shop, and he has held that the rate of wages fixed by the trade board applies only in respect of the work at the bench. That view puts too narrow a construction upon the Trade Boards Acts, the object of which is to secure that proper wages shall be paid to workmen in the particular trade. The appellant was on the respondents' premises during the whole working day for the purpose of taking in work brought by customers, and the essential nature of his employment was not altered by the fact that he had to do various trifling things besides repairing boots. Sect. 8 of the Act of 1918 (1) was passed to meet this very kind of case; it carries out the specific object of the Act—namely, that once a worker comes within the Act he shall be paid the minimum rate of wages fixed by the trade board. Nothing which the appellant was called upon to do could be said to be unconnected with boot repairing. Everything in fact which he did was connected with that trade. Moreover, it is sufficient if he can show that one of the purposes for which he was on the respondents' premises was waiting for work to be brought to him, that is, boots and shoes brought in by customers to be repaired.

As to the proviso to s. 8 with regard to meal times, that has no application to this case, where the appellant was often busier at meal times than at others.

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(1) Trade Boards Act, 1918, s. 8: "For the purpose of calculating the amount of the wages payable in the case of a worker employed on any work for which a minimum rate of wages has been fixed . . . . the worker shall be deemed to have been employed during all the time during which he was present on the premises of the employer, unless the employer proves . . . . that he was so present for some purpose unconnected with his work and other than that of waiting for work to be given to him to perform, and in the case of a worker employed on piecework shall be deemed during any time during which he was so present, and was not doing piecework, to have been employed at the general minimum time rate applicable to workers of the class to which he belongs.

Provided that—

. . . . . .

(*b*) a worker while present during normal meal times in a room or place in which no work is being done shall be deemed to be present for a purpose unconnected with his work."

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Neilson K.C. and *Sir Robert Aske* for the respondents were called upon only as to the construction of s. 8 of the Trade Boards Act, 1918.

The respondents have satisfied the onus cast upon them by that section by showing that the appellant was engaged to do two different kinds of work—boot repairing and other work. When doing the latter class of work he was present on the respondents' premises for work unconnected with boot repairing, and was there not "waiting for work to be given him to perform"—words which refer not to waiting for work being brought in by customers but waiting for work which he is prevented from doing owing to the absence, for example, of raw material.

[They were stopped.]

Schiller K.C. replied.

SCRUTTON L.J. There are undoubtedly some difficulties in this case, and the fact that the Government department concerned has, as we are told, changed its mind in the course of years, shows that the matter is not an easy one; but, having listened carefully to the argument of Mr. Schiller, I am not convinced that the judgment of MacKinnon J. was wrong; indeed, I think that the judgment was right, and I would have been content to adopt it. In deference, however, to the argument which has been addressed to us, and to show that I have formed an independent opinion, I will express my views in my own words.

The plaintiff brought his action claiming that for a period of nearly three years he was paid less than he ought to have been paid under the Trade Boards Acts and Rules. To that claim the respondents answer that the appellant was employed to do boot repairing—a statement to which the appellant is entitled to add that part of his work was that of a foreman and manager—and also in another capacity, to do clerical and financial work, and, they say, that an accountant, financial manager, or clerk is not a boot repairer. They say further that the appellant's wages for a full week of boot repairing was so much, and if he worked for a less period the wages were to be proportionately reduced, and that in fact the appellant, according to his own evidence, was employed in boot repairing for only about four hours daily. If the respondents had added to what the appellant had to do some infinitesimal amount of work which was not boot repairing in order thereby to evade the operation of the Trade Boards Order, the Courts would be astute to defeat such an attempted evasion. But on the facts of this case it is impossible to say that that is the position shown by the evidence. The evidence shows that the appellant was a composite servant, devoting part of his time to boot repairing, and part to clerical and financial work and sales, which do not come within the term " boot repairing." The trade, which is the subject-matter of this Trade Boards Order fixing rates, is defined in this way : " The boot and shoe repairing trade, that is to say, the repairing wherever carried on of boots, shoes, slippers, and all kinds of leather footwear, including the making of bespoke handsewn, riveted or pegged leather footwear, but excluding the manufacture of leather footwear on a large scale, the repairing of saddlery and leather goods other than leather footwear and the retailing of leather footwear." It is difficult to see how the repairing of saddlery could come within the boot and shoe repairing trade, but the Ministry apparently thought that it might. Following upon that Order is another which provides that male workers—the journeymen—in the boot-repairing trade are to be paid wages for a 48 hours week at rates varying according to the percentage of the cost of living, and a manager or foreman is to have a larger allowance—namely, 80*s.*, 74*s.* or 72*s.*; but those rates were based on a week of 48 hours, and were " subject to a proportionate reduction according as the number of hours of employment in any week is less than 48." That clearly contemplates that if a workman is working for, say, 24 hours his guaranteed wages are to be half only of the rates mentioned. A foreman or manager is defined as " a worker who is employed in any branch of the trade specified in the Trade Boards (Boot and Shoe Repairing) Order, 1919, and (*a*) who exercises sole supervising authority over all journeymen exceeding three in number "—that is not the appellant's case, seeing that he was alone in the shop and exercised supervision only over himself—" (*b*) who (whether working alone "—that is the appellant's case—" or with any other worker), under the terms of his employment in addition to any work which may be required of him as a journeyman fits up or supervises the fitting up of the work, and has control of the repairing or making and technical direction thereof." That seems to point only to a foreman who is technically directing the work of boot repairing. It is not necessary to go into the mysteries of fitting-up work, but it appears to be something which is a skilled part of boot repairing in the sense that it is directing the journeyman technically as to the repairing. Nothing is said about the work of a manager who manages the shop, who manages the finance, the accounts and the clerical work; all that is treated as not being the work of boot repairing. Financial work and boot repairing are quite different. If a man is put in charge of a shop where there are a dozen journeyman workers, and all he has to do is to book orders, to keep the accounts, to pay money into the bank, and, generally, to do clerical and accountancy work, he clearly does not come within the Boot and Shoe Repairing Order. Of course it may in each case be a question of degree. A man may do so little work other than boot repairing that he is substantially a boot repairer. But under this agreement the appellant had a very substantial amount of clerical and financial work to do—filling up forms, checking money and paying it into the bank, which clearly does not come within the Boot Repairing Order. Further, the appellant had to act as salesman of sundries, which are not repairs, and he had to keep the shop open for a certain time in order to sell these things. That being his position, the appellant was doing not one substantial work and also something colourable inserted to defeat the Order, but two distinct kinds of work. He said himself that his boot-repairing work took up only four hours a day. Subject to the consideration of s. 8 of the Trade Boards Act, 1918, to which I am coming,

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a man cannot claim to be entitled to be paid the full wages for boot repairing where he is not working 48, but only 24 hours a week on boot repairing.

The only question which to my mind creates any difficulty arises on s. 8 of the Act of 1918. Does an employer, when he proves that the employee has to be in the shop so many hours a day for clerical and financial work and for the purpose of selling sundries, prove that the employee is present for some purpose unconnected with the work of boot repairing? I think he does. It is a nice question, but I do not think that Parliament in using the language of s. 8 was thinking that if a man was in the shop for some purpose which is not boot repairing but which has some remote connection with it—for example, if he sells a boot-lace—that therefore it is connected with boot repairing. In my opinion Parliament was thinking of work as to which it could really be said that it was connected with the technical work of boot repairing, involving manual labour. Here the added work was not connected in any way with that technical work. That seems to me to answer the question. But it is said that the appellant had to stay in the shop in case boots for repair were brought in. That is true, but he had also to stay there because he had been engaged to do work which was not repairing. He could not, if he knew that no repairing work would come in, shut up the shop and go away; he had contracted to stay in the shop for the work for which the agreement provided and which is not within the Boot Repairing Order.

It is not strictly necessary to consider the remaining matter which was mentioned—namely, that the time for meals cannot be deducted. The provisions relating to meal times are that the appellant had so many hours for meals during which he was not to do any boot repairing or sell sundries; the only things he could be required to do were to take an order for boot repairing if it came in and to take payment from a person who came in to take away finished repairs. That not being work which in my view is within the Order, it follows that if there were any question of under-payment he could not have claimed for the meal hours mentioned in the agreement.

For the reasons I have given the appeal must be dismissed, and I am the more confident in coming to that conclusion because in my opinion it would be something of a scandal if a man could stay at his work for three years and at the end of that time be allowed to claim this excess, whereas if he had claimed it at the beginning of his engagement the shop would have been shut up at once, as on the figures as to the takings it would have been kept open at a loss if the appellant's claim were held good. I think MacKinnon J.'s judgment was right in law and moreover works substantial justice.

Sankey L.J. stated the facts, read the material clauses of the agreement, the terms of the Boot Repairing Order, and continued: It is said for the appellant that the agreement is void under s. 6, sub-s. 5, of the Trade Boards Act, 1909, and therefore the respondents are not entitled to rely upon it. Reliance was placed for the appellant on s. 8 of the Trade Boards Act, 1918, as he must be deemed to have been employed at the minimum rate of wages during all the time he was present in the shop, although during part of that time he was doing work other than boot repairing, unless the respondents proved (1.) that he was present for some purpose unconnected with that work, and (2.) for a purpose other than that of waiting for work to be given to him to perform. It was said that while he was not actually employed in repairing boots he was attending to customers, keeping the books and looking after the shop, which were purposes connected with his work as a boot and shoe repairer. For the respondents, on the other hand, it is said that the real question is, during what time was the appellant working as a boot and shoe repairer, and not during what time was he a member of the boot and shoe repairing trade? Further, it is said for them that as the appellant was only engaged in boot repairing during about half the time he was in the shop and has been paid the minimum rate of wages in respect of that time, nothing more is due to him. Those are the

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two contentions. It appears to me that there may be a case where beyond all question a man is employed at work which comes within the Trade Boards Acts; on the other hand there may be a case where the man is employed for part of his time on such work, but for the remainder of his time his work has nothing to do with that employment. Between those extremes there may be a border-line case, and such a case always creates difficulties. The present is a border-line case, and it is a difficult one, but, in my view, MacKinnon J. has come to a correct determination. He said (1): "The question which I have to decide is whether the plaintiff can say that he was employed in the trade of boot and shoe repairing during the whole time which he was present in the defendants' shop, or whether the defendants can say that he was only so employed during that part of the day in which he was actually repairing boots and shoes." We are not concerned with any question of waiting for work. I agree with MacKinnon J. that s. 8 of the Act of 1918 contemplates the case of a man who is definitely employed during the whole of his time in boot and shoe repairing and who is doing that all the time when there are boots and shoes to be repaired. Then we have to deal with the onus of proof placed upon the employer by the same section. Having regard to the dual capacity in which the appellant was engaged and the numerous stipulations in the agreement which are closely connected with boot repairing simply and to those stipulations which are of a wholly different character and which compel the employee to do all the clerical work, keep the books and make out a balance-sheet, I have come to the conclusion that during part of the appellant's time he was employed in a different kind of work from that coming within the Trade Boards Orders. To some extent, as I have indicated, the question is one of degree and one of fact, but having regard to the proper interpretation of s. 8, and to the facts found, I am of opinion that the respondents have discharged the onus placed upon them. In my view the judgment was right and the appeal should be dismissed.

(1) [1928] 1 K. B. 461.

Romer J. I agree, and I only desire to add a few words. It may be taken that the appellant was a foreman or manager within the meaning of the Order inasmuch as he was a worker employed in the specified trade, and he, as he was working alone, fitted up or supervised the fitting up of the work; but I think it is reasonably plain that all the work the appellant did as foreman and manager was done during the hours when he was, to use the phrase used in the evidence, at the bench.

The other observation I wish to make is in relation to s. 8 of the Act of 1918. In order to escape from the provisions of that section the respondents have not to prove that the employee was present exclusively for some purposes unconnected with his work, and other than that of waiting for work to be given to him to perform. As I read the section it is sufficient if the employers prove that one of the purposes—that means one of the substantial purposes—for which the employee was present on the premises was a purpose unconnected with his work, and other than that of waiting for work to be given to him to perform. If it is asked, for what purpose was the appellant present on the premises during the hours when he was not working at the bench, the answer is that he was present for the purpose specified in his agreement of service. When that agreement is looked at it will be seen that he was employed not only for the purpose of discharging the duties of foreman and manager, but also for the purpose of discharging duties which, in my opinion, were wholly unconnected with his work as foreman and manager.

Appeal dismissed.

Solicitors for appellant: *Church, Adams & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for respondents: *T. D. Jones & Co., for Topham & Phillips, Harrogate.*

J. S. H.

[IN THE COURT OF APPEAL.]

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Jan. 25, 26, 27; *Feb.* 21.

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[1926. L. 1315.]

Company—Prospectus—Non-compliance with statutory Requirements—Issue to Public—Subscription for Shares on Faith of Prospectus—Damage—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 81.

A company being in want of further capital, a document (called "A" in the case) was prepared by the defendant, who was the managing director, and signed by the other directors, stating the position of the company, that it was proposed to issue 20,000 shares, and giving an estimate of the profits after the new capital was available. Attached was an application form for preference and ordinary shares. A second document (called "B" in the case) was also prepared by the defendant, written on the company's paper and addressed to a fellow director, marked "strictly private and confidential," which, after setting out the amount of nominal and issued capital, stated the purposes for which the additional capital was required, and concluded thus: "I shall be very happy to discuss this proposition in all its details with any one who is really interested." Attached was a form of application for ordinary shares. Several copies of these documents were given to the defendant's fellow director, who sent a copy to a solicitor, with a request, in substance, that he should find some client willing to provide the capital required. The solicitor sent the papers to the plaintiff's brother-in-law, and he in turn sent them to the plaintiff, who, on the faith of the statements they contained, subscribed for 3000 shares in the company. Subsequently ascertaining that a considerable part of the issued capital had been issued otherwise than for cash—a fact that was not stated in documents A and B—he sued the defendant for damages for the loss he had sustained through that omission by the defendant to comply with the requirements of s. 81, sub-s. 1 (*e*), of the Companies (Consolidation) Act, 1908.

At the trial the jury found that documents A and B were an offer of shares by the company to the public. In answer to the question, whether they were in fact issued to the public, the jury said: "There is no proof of this." The jury further found that the plaintiff sustained damage to the amount of 2000*l.* After argument, Salter J. held that there was no evidence that the documents were ever issued to the public, and he entered judgment for the defendant.

On appeal:—

Held (Scrutton L.J. dissenting), that documents A and B had been issued to the public, and, therefore, that the plaintiff was entitled to recover.

Decision of Salter J. reversed.

APPEAL from Salter J. in an action tried with a special jury.

The plaintiff claimed damages for fraudulent misrepresentation in an invitation to take shares in the British and Foreign Industrials, Ld., or, alternatively, damages for loss sustained by him through the failure of the defendant to comply with s. 81 of the Companies (Consolidation) Act, 1908. (1)

The British and Foreign Industrials, Ld., was registered in October, 1920, as a private company, which by its articles was prohibited from issuing any invitation to the public to subscribe for shares. It had a nominal capital of 50,000*l*. in 1*l*. shares, of which 40,300 had been issued. The company was formed to take over the undertaking of another company, and of its capital 10,300 shares were issued for cash, and 30,000 were issued in part to the defendant and in part to another person for goodwill, patents and patent rights.

In 1921 the company, being in need of further capital, a document, called "A" in the case, was prepared by the defendant, who was the managing director of the company, and signed by all four directors, which stated that it was proposed to issue 20,000 7½ per cent. participating cumulative preference shares of 1*l*. each at par, and that for every two preference shares allotted the applicant would have the option to take one ordinary share of 1*l*. at par; the document stated the position of the company, its properties and its options, and concluded thus: "In conclusion, it is well to point out that this company without the aid of any additional capital will be making a yearly net profit of more than 20,000*l*., more than twelve times the amount required to pay the preference share dividend on the present issue. The business, on which we have an option, when it is taken over, will yield a further profit as shown by the audited accounts enough to pay the preference dividend more than four times. With the new capital available, it is a conservative estimate that within the next two years the annual net profit of this company will have risen to 50,000*l*." To that document was annexed an application form for both preference and ordinary shares addressed to the directors.

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(1) Companies (Consolidation) Act, 1908, s. 81, sub-s. 1: "Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state—

. . . . (*e*) The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or are proposed or intended to be issued. . . . ."

Sub-s. 6: "In the event of non-compliance with any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance, if he proves that—

(*a*) As regards any matter not disclosed, he was not cognizant thereof; or

(*b*) The non-compliance arose from an honest mistake of fact on his part: . . . ."

Sub-s. 7: "This section shall not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company, whether with or without the right to renounce in favour of other persons, but subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company or subsequently."

Sect. 285: "In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say):—

" . . . . 'Prospectus' means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company."

A second document, called "B" in the case, was also prepared by the defendant, written on the company's paper, and addressed to another director, Mr. Eshelby, marked "strictly private and confidential," which after stating that the nominal capital of the company was 50,000*l*., and the issued capital 40,300*l*., set out its assets and liabilities as on August 31, 1921, stated the purposes for which the additional capital was required, and concluded: "I shall be very happy to discuss this proposition in all its details with any one who is really interested." Attached was a form of application for ordinary shares in the same terms, mutatis mutandis, as the one for preference shares annexed to document A.

Several copies of these documents were given to Mr. Eshelby, not with a view to his showing them to any particular individual, but to assist him in his quest for some person or persons willing to find the additional capital. Mr. Eshelby sent a copy of the documents to Mr. Alcock, a Liverpool solicitor, with a request, in substance, that he should find some client willing to provide the new capital required by

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the company. Mr. Alcock sent the papers to the plaintiff's brother-in-law, who in turn sent them to the plaintiff, and he within a few days, and after an interview with the defendant, agreed to, and did, subscribe for 3000 ordinary shares, which he paid for in full.

The shares having seriously depreciated in value, and the plaintiff having ascertained that of the 40,300 shares issued by the company before October, 1921, 30,000 had been issued to the vendors otherwise than for cash, which fact was not stated in the documents sent to him, as required by s. 81, sub-s. 1, of the Companies (Consolidation) Act, 1908, claimed damages for fraudulent misrepresentations in the documents and for breach of statutory duty in not complying with s. 81.

At the trial the jury found that certain statements complained of as appearing in the documents were untrue and that the plaintiff was induced by them to take the shares, but that those statements were not fraudulently made by the defendant. The jury further found that the documents A and B were an offer of shares by the company to the public; and to the further question whether the documents were in fact issued to the public, the jury said: "There is no proof of this." The jury further found that the plaintiff sustained damage to the amount of 2000*l.*

After argument, Salter J. held that there was no evidence that documents A and B were ever issued to the public, and on that ground he entered judgment for the defendant.

The plaintiff appealed.

du Parcq K.C. and *W. T. Monckton* for the appellant. Salter J. was wrong in holding that documents A and B were not issued to the public. Where a prospectus which has been approved by a company is issued to some one who is a member of the public and he takes shares on the faith of the statements contained in it he has his remedy if it omits statements which it ought to contain. If, after preparing the documents A and B, the defendant had sent them by a messenger to the printer, the mere fact that on his way the messenger read the documents and, acting upon them, applied for shares, that would not have been an issue of the documents to the public. But in this case the documents were sent to Mr. Alcock for the express purpose of being shown by him to clients of his who were likely to invest their money. The plaintiff only received them as a member of the public. In view of the jury's finding that the documents were an offer of shares to the public it was wrongly left to them to say whether they were issued to the public. In *In re South of England Natural Gas, &c., Co.* (1) a prospectus headed "For private circulation only" and sent only to the shareholders in certain gas companies in which the promoter was interested was held to have been an offer of shares to the public. In *Baty* v. *Keswick* (2), upon which Salter J. placed reliance, the document said to constitute a prospectus was a mere draft which in fact was never issued. So in the Scottish case of *Sleigh* v. *Glasgow and Transvaal Options* (3) the Court was really considering whether the document there in question was a prospectus. Here it is found that the documents constituted a prospectus. *Sherwell* v. *Combined Incandescent Mantles Syndicate* (4) does not help the defendants, as there the issue of the document, which was marked "strictly private and confidential: not for publication," was not authorized by the company which was being sued.

[*Twycross* v. *Grant* (5) was also referred to.]

J. G. Hurst K.C. and *Maurice Healy* for the respondent. Unless an invitation to take shares in a company is issued to the public as distinct from an issue to a private circle, no question under s. 81 can arise. There is nothing in the Act to prevent a company making a private appeal for capital, either in writing or orally. Whether there has been an issue to the public is a question of fact which in this case has been answered adversely to the appellant. Here there was no intention to broadcast the appeal for capital. *Baty* v.

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(1) [1911] 1 Ch. 573.

(2) (1901) 85 L. T. 18.

(3) (1904) 6 F. 420.

(4) [1907] W. N. 110; 23 Times L. R. 482.

(5) (1877) 2 C. P. D. 469.

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Keswick (1) is a clear authority that there must be an issue to the public. So, too, it was said by Warrington J. in *Sherwell* v. *Combined Incandescent Mantles Syndicate* (2) that what was meant by an offer of shares to the public for subscription was " an offer of shares to any one who should choose to come in." The fact that in *In re South of England Natural Gas, &c., Co.* (3) Swinfen Eady J. considered the extent of the issue shows that the question is one of fact.

If this contention is wrong, there must be a new trial, for the measure of damages when the allegation of fraud has been negatived is entirely different from what it would have been if fraud had been established.

du Parcq K.C. replied.

Cur. adv. vult.

Feb. 21. The following judgments were read :—

SCRUTTON L.J. Mr. Lynde in September, 1921, invested 3000*l.* in ordinary shares of British and Foreign Industrials, Ld. As part of the consideration for his investment he became a director and a paid officer of the company. He remained a director and officer of that and another company which bought part of the original business till April, 1924, when he was dismissed without notice, and, as has been held in another action, wrongfully dismissed. He then looked up the documents which had formed part of the original inducement to him to invest. Coming to the conclusion that some statements in them were untrue and fraudulent, in 1926 he brought an action for damages against the person, Mr. Nash, principally concerned in the company, who had signed these documents, for damages for deceit and for breaches of the Companies Act in the issue of a " prospectus." The jury found that the statements were untrue and that Lynde relied on them, but that they were not fraudulent. The action for deceit therefore failed.

On that part of the action which rested on a breach of the statutory provisions as to a prospectus, it was clear that the document, if a "prospectus" as defined by the statute did not state the particulars required by s. 81, sub-s. 1 (*e*), of the Act of 1908, amongst others, the amount of shares issued in the preceding two years as fully paid up otherwise than in cash, and the questions argued were: (1.) whether the documents seen by the plaintiff were on the face of them an offer of shares to the public. This was left to the jury, who said they were, and Salter J. agreed. (2.) Whether the documents were in fact issued to the public, to which the jury replied: "There is no proof of this." (3.) Did the plaintiff sustain damages by the omission? This, as the number of shares issued was stated correctly, means: Did he rely, in taking the shares, on the assumption that all the shares were issued for cash, or the omission to state that some were not? The jury found that the plaintiff did sustain damage by the omission.

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(1) (1901) 85 L. T. 18.

(2) [1907] W. N. 110; 23 Times L. R. 482.

(3) [1911] 1 Ch. 573.

The learned judge had at first been disposed to think that if the document was on the face of it an offer to the public, it was immaterial whether in fact it was issued to the public, but after hearing further argument he changed his view and held that the plaintiff must prove that the document was issued to the public, and as he failed to satisfy the jury of this he failed in his action.

The plaintiff thereupon appealed and asked either for judgment on the ground that issue to the public was immaterial, or for a new trial on the ground that the judge had misdirected the jury on the question of issue. This renders it necessary to consider in more detail the documents relied on and what was done with them.

The company was a private company which, by its articles, was prohibited from issuing any invitation to the public to subscribe for shares. The company had an authorized capital of 50,000*l.*, of which 40,300*l.* had been issued in ordinary shares. It could increase its capital in general meeting, and could make the new capital preferred, ordinary, or deferred shares. It had not at the time in question increased its capital or issued any preference shares. Its directors were considering whether at least 30,000*l.* more capital should be raised, 20,000*l.* in preference shares and 10,000*l.* in ordinary shares, one ordinary share for each two preference shares. Apparently Mr. Nash, the managing director and promoter, drafted two documents, one called B, dated September 26, 1921, but apparently originally prepared and sent to Mr. Eshelby on September 12, addressed to a fellow director, Mr. Eshelby, signed "J. G. Nash," and headed "Strictly private and confidential," containing detailed statements as to the position of the company, "figures as to how we stand as at August 31, 1921," and containing the statement: Issued capital 40,300*l.*, and patents 30,000*l.* The other document, undated and headed with the name of the company, is addressed: "Gentlemen," and its first two paragraphs are: "In order to meet the rapid development requirements of this company, it is now necessary to increase the nominal capital by 50,000*l.* to 100,000*l.* It is proposed to issue 20,000 7½ per cent. participating cumulative preference shares of 1*l.* each at par, participating up to 10 per cent. after 10 per cent. has been paid on the ordinary shares. These shares will also be preferred as to capital. There are no debentures; mortgages; or bankers' loans against the company. Every two preference shares allotted will give the applicant an option to take one ordinary share of 1*l.* each at par. The position of this company, its properties, and its options are briefly and conservatively described below."

Mr. Eshelby at the time described it as "General scheme for increase of capital as laid before the board of directors together with general particulars." This perhaps explains the original heading, "Gentlemen." There is no entry of a minute approving it, but the four directors seem to have signed it, and then "Gentlemen" could not refer to the directors, but to the persons to whom it was shown. Between twenty and thirty typed copies were made, and it appears to have been understood that each director might approach such friends whom he thought suitable, with the documents as a basis for discussion. Application forms for preference and ordinary shares were attached, but the company had at that time no power to issue 20,000*l.* preference shares, or 10,000*l.* ordinary shares.

On September 26 Eshelby sent the documents to Mr. Alcock, a solicitor, for confidential information and use, to show wealthy clients, or to fathers who wanted to place a son: "there would be no difficulty in accommodating the conditions to suit your clients." Alcock on October 4 sent the documents to Major Wrigley, whom he addressed by his Christian name, to show his brother-in-law, Mr. Lynde. There is no evidence that the document went to any other persons, or that any shares other than Mr. Lynde's shares were allotted. Mr. Lynde made a number of inquiries, including sending some one to Somerset House, who did not report what would be on the file there—namely, that 30,000*l.* shares were issued not for cash. Ultimately Mr. Lynde by letter—not on the application form—agreed to take 3000 ordinary shares on the terms that he was appointed a director and given an active position at a salary of 400*l.* a year.

The question then is: On these facts, the jury having to determine facts and inferences from facts, has any offence against the Companies Act been committed which has caused damage to the plaintiff?

Sect. 81, sub-s. 1, of the Companies Act, 1908, begins: "Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state . . . . ." "Prospectus" is defined in s. 285: "'Prospectus' means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company." The result appears to me to be to make it necessary to show that the document containing the misstatement or omission is: (1.) an offer to the public to take shares; (2.) issued to the public. In my opinion, a document couched in such general terms that if issued to the public it would be an invitation to take shares, does not become a document issued to the public if it is never shown at all, or is only shown to one man in such conditions that it cannot be said to be "issued to the public." Directors, especially of a private company, may easily show an invitation to take shares to one or two friends without any intention of ever making a public offer. On the other hand, they may easily send it to so many people, though of a limited class, that it becomes an offer to the public. In *In re South of England Natural Gas, &c., Co.* (1), where some 3000 copies of a prospectus marked "for private circulation only" were printed and issued to shareholders of gas companies in which the promoter was interested, Swinfen Eady J. held the prospectus was "issued to the public." On the other hand, in *Sherwell* v. *Combined Incandescent Mantles Syndicate* (2), when some of the directors without the authority of the company sent a prospectus marked "strictly private and confidential, not for publication" to some of their friends, Warrington J. said that no action lay against the company, but also said that "whether or not capital had been offered to the public was a pure question of fact. . . . . It meant . . . . an offer of shares to any one who should choose to come in." I agree with this; it seems to me to be a question of degree whether there is a sufficiently general offering to make it a public offer, or such a limited selected distribution as to make it private negotiation. One may consider the whole circumstances, that the company was a private company which could not under its articles legally make an offer to the public; that the document complied with none of the requirements that an offer to the public should comply with under ss. 80 and 81 of the Act of 1908; that it was only proved to have been shown to one person as a possible investor, though no doubt the directors contemplated that Alcock might show it to others; the number of copies typed, the lack of evidence of other issues, and so on. But it remains, in my view, a question of fact for the jury. I think the judge was entitled to leave to them both questions. As to the question whether the document was an offer to the public, Mathew L.J. constantly left this class of question to the

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(1) [1911] 1 Ch. 573. (2) [1907] W. N. 110; 23 Times L. R. 482, 483.

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commercial jury, with satisfactory results. I think they might have found either way; and I could not interfere with their verdict.

On the further question whether the document was issued to the public, I cannot say that the jury must find on the evidence of one document issued that it was issued to the public. When the learned judge directed the jury that it was a question of degree what "issued" means, I agree with him. The alleged misdirection is, I gather, in leaving the question to them at all, or in not directing them that if they thought the document on the face of it an offer to the public, one showing under whatever circumstances would do. I cannot agree to this, and prefer the learned judge's later view of the law. In my opinion there was evidence on which the jury could make their finding, and no misdirection.

The appeal should, in my opinion, be dismissed, with the usual consequences; but as my brethren take an opposite view the appeal must be allowed and judgment entered for the plaintiff in the terms stated by Atkin L.J.

ATKIN L.J. The defendant company was registered on October 28, 1920, as a private company with a nominal capital of 50,000*l.* in 1*l.* shares. It was formed to take over the undertaking of another company, John Nash, Royston & Co., Ld., and of its capital 10,300 shares were issued for cash, and 30,000 were issued as to 22,500 to Nash and 7500 to Royston, presumably by direction of the vendors, for goodwill, patents and patent rights. The company possessed the patent rights of an extending dining table and possessed works at Liverpool where the table was manufactured; it possessed the patent rights in an electrical condenser, some of the foreign rights in which it had disposed of; and it also possessed the patent rights in a stair carpet protector. In 1921 the company apparently needed further capital, and a document was prepared by Mr. Nash, the manag-ng director, and signed by all four of the directors, which is the document marked "A." A further document was also

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prepared by Mr. Nash and addressed to another director, Mr. Eshelby, dated September 26, 1921. It gives more detailed information than "A" as to the business of the company. "A" contains a statement that it is proposed to issue 20,000 7½ per cent. participating preference shares, and that for every two preference shares allotted the applicant will have the option to take one ordinary share of 1*l.* at par; and the document contains an application form for both preference and ordinary shares, addressed to the directors. It does not appear that at any material time the directors had passed any resolution to create preference shares, but they had powers under the articles at any time to do so.

The two documents, which, it was agreed at the trial, were to be read together and treated as one, came into the possession of the plaintiff in circumstances the legal effect of which is the question in this action.

The plaintiff had business connections in India which he was proposing to discontinue, and he was minded to invest part of his capital in an appropriate business venture in this country. He was attracted by the prospects held out by the documents, which are undoubtedly alluring, and in October applied for and was allotted 3000 ordinary shares on the terms that when he returned from India next year he was to be appointed a director with an active position at a salary of not less than 400*l.* a year. These terms were carried out: the plaintiff became a director with a salaried post; and later in 1922 applied for and was allotted a further 500 ordinary shares. Unfortunately, early in 1923, the company, being short of cash, had to part with its table business to a new company, John Nash, Ld., which had command of more capital. The plaintiff transferred his services to that company, which apparently continued to be managed by Mr. Nash. In 1924 there was friction between the plaintiff and Mr. Nash. The plaintiff was dismissed. He brought an action for wrongful dismissal against the company, in which he was successful. When that action was over, he brought the present action against Mr. Nash.

His claim was twofold. He claimed that he was induced to apply for shares in the company by fraudulent misrepresentations contained in the documents " A " and " B," for which he said Mr. Nash was responsible. He also said that apart from fraud, the two documents constituted a prospectus within the meaning of the Companies Act, 1908, s. 81; that it had been issued by Mr. Nash; that it omitted the information required by s. 81, sub-s. 1 (*e*)—namely, the number and amount of shares which had been issued as fully paid up otherwise than for cash; and he claimed damages.

The action was tried before Salter J. and a special jury. With regard to fraud, the jury found that the statements complained of were untrue, and that the plaintiff had been induced by them to invest his money. But they found that the statements had not been made fraudulently by Mr. Nash. These findings put an end to the claim for fraud, and we are left to deal with the further or alternative claim based on s. 81. On this part of the case the plaintiff had to establish that the documents together constituted a prospectus, that the prospectus had been issued by Mr. Nash, and that the plaintiff had suffered damage by the alleged statutory omission.

The definition of " prospectus " is contained in s. 285 of the Act. " ' Prospectus ' means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company." In dealing with this matter the judge was treating a subject-matter which is outside the ordinary experience of jury trials, and he must have felt some embarrassment. He had to leave any disputed question of fact to the jury, and he left to them the question whether " A " and " B " together was an offer of shares made by the company to the public. The jury answered this " Yes," and they further found that the plaintiff had sustained damage by reason of the omission to state the issue of shares as fully paid; and that the damages were 2000*l*. The judge, however, at the instance of the defendant, left to the jury a further question: Was " A " and " B " issued to the public? On this, the judge told the jury that there was no evidence that any human eye outside the directors' room ever saw "A" and "B" except Alcock, Wrigley, and the plaintiff. "Upon that you have to say whether this document in your view was issued to the public. It is a question of degree, no doubt, what 'issued to the public' means. But upon these facts I should rather doubt myself whether you would say that the plaintiff had satisfied you that that document was ever issued to the public." On that direction it is perhaps not surprising that the jury answered the question by saying "There is no proof of this." On this finding the learned judge on consideration entered judgment for the defendant.

It appears to me that in dealing with the construction of a statute one avoids danger by sticking as closely as possible to the actual words. The words "issue to the public" are not to be found in the section. The two relevant questions appear to be: Was there a "prospectus"; and, if so, was it issued? The section read with s. 80 appears plainly to contemplate the existence of a document, a prospectus before issue. A copy of it has to be filed before issue. If issued, it must contain certain particulars. To be a prospectus, the document must contain an offer to the public for subscription. Presumably the words of the document must be accompanied by a genuine intention to offer to the public, otherwise an invitation only intended for a single individual might, if couched in general language, become a prospectus. This admits of questions of fact apart from what would otherwise be a matter of construction. But once satisfied that the document contains an offer to the public, the only other requisite is that it should be issued. I see no reason for implying or adding the requirement of "issuing to the public"; nor is it easy to ascertain how that fact is proved. An offer to the public is issued, I should suppose, when it is delivered by the issuer with the intention of effectuating the offer; in other words, when it is delivered as the document it purports to be—namely, an offer to the public. It would not be so issued if it were handed over merely as a precedent,

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good or bad, or a curiosity, or as a draft, or for the special and sole information of the person to whom it is delivered. On the other hand, if it is intended that in the hands of the person to whom it is delivered it shall serve the purpose of inviting any one who may peruse it to subscribe, it appears to me to be issued. It can hardly be contended that the issue of a prospectus must be to a class co-extensive with those who are invited; that if you invite all the public you must issue to all the public.

I am satisfied that the remedial nature of the legislation, which in this form dates from the Act of 1900, would be greatly impaired by the view accepted in the Court below. A judge may be allowed to know that grave public disadvantages have attended on some occasions the activities of so-called "share pushers," gentlemen who canvass members of the public to apply for or buy worthless shares. Such an agent armed with one copy of a general offer to the public defying all the statutory requirements, might succeed in raising the capital he required from even one, or certainly a few victims. Are they not within the statutory protection? or could the statute be evaded by dribbling out the prospectus in small quantities to one limited class after another; and would the first issues be unprotected until the volume reached the dimensions of a public issue? I cannot think so. The real difficulty in this case, in my opinion, arose on the question whether this was a prospectus or not. I think it may well have been contended, as I have no doubt it was before the jury, that the circumstances of the case and the form of the documents, especially document "B," indicate that there never was an intention to offer the shares to any number of the public, but only to such favoured few as might be selected by the directors as suitable shareholders. On the other hand, the extent of the offer and the form of application, and other circumstances, afford evidence from which the jury might in my view have found that the documents did make an offer to the public. This finding was not attacked before us, and must stand. On this footing it appears to me that there was no dispute that the document was issued in the sense I have described above. It was sent to the solicitor, Mr. Alcock, to serve as an invitation to any number of the public whom he might think likely to be interested.

It appears to me, therefore, that there was no question to be left to the jury on the matter of "issue," and that on the answers to the questions that were properly left, the plaintiff is entitled to succeed. It was not disputed before us that the effect of the section is that though it contains no sanction for the prohibition, yet a person injured by the omission is entitled to damages; and this, I think, is the true view. It appears to have been the view of Swinfen Eady J. in *In re South of England Natural Gas, &c., Co.* (1) There are no authorities which govern this case, and I do not, for my part, derive much assistance from cases upon other sections or different sections of the former Companies Acts. It may well be that the issue of a document to only a limited number of persons may be evidence of an intention not to offer shares to the public, but to offer them to some class of a more restricted denomination; for example, evidence that the document is not a "prospectus." But, as I have said, the "prospectus" point is determined for us here by the unchallenged finding of the jury.

In these circumstances, the appeal should be allowed, with costs, and judgment entered for the plaintiff for 2000*l.*, with costs. As the trial was by jury, the defendant would in any event obtain his costs of the issue as to fraudulent misrepresentation, but it may be as well to add that he should have these costs, with a set-off.

EVE J. On October 28, 1920, the British and Foreign Industrials, Ld., was registered under the Companies Acts, 1908 to 1917, with the primary object of acquiring as a going concern and upon the terms of an agreement, then already prepared, the business theretofore carried on by John Nash, Royston & Co., Ld.

The capital was 50,000*l.*, divided into 1*l.* shares, and by clause 5 of the memorandum it was provided (inter alia) that any of the shares for the time being unissued and any new shares from time to time created might be issued as preference shares in respect of dividend or repayment of capital or both. By art. 3, the company was declared to be a private company, and accordingly it was thereby provided that no invitation should be made to the public to subscribe for any shares of the company.

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(1) [1911] 1 Ch. 573.

By the month of September, 1921, the company had issued 40,300 of its shares of which 30,000 had been issued as fully paid up by way of consideration for certain patents and other assets, and the balance of 10,300 had been paid for in cash.

At the date just mentioned, the company was in want of funds for the further development of its business, and contemplated an increase of capital and the issue of further shares—preference or ordinary, as circumstances might demand. Oblivious of, or ignoring, the provisions of art. 3, the directors or some one or more of them thereupon drew up two documents which, read together as one, the jury in this case have—in my opinion—rightly pronounced to be an offer of shares to the public or, in other words, an invitation to the public to subscribe for shares.

The one document is signed by the four directors of the company; it begins by stating that "in order to meet the rapid development requirements of the company, it is now necessary to increase the capital from 50,000*l.* to 100,000*l.*," and goes on to say that "it is proposed to issue 20,000 7½ per cent. participating cumulative preference shares of 1*l.* each at par," and that "every two preference shares allotted will give the applicant an option to take one ordinary share of 1*l.* each at par." Then follows what is called a brief and conservative description of the company, its properties and its options. It concludes by pointing out that the company without the aid of additional capital will be making a yearly net profit of more than 20,000*l.*—more than twelve times the amount required to pay the preference share dividend on the then present issue, and that with the new capital available an increase of the annual net profit to 50,000*l.*

within the next two years would be a conservative estimate. Attached to this document is a form of application for preference shares, addressed to the directors of the company. Except that it contains no reference to the prospectus, it is in the ordinary form.

The second document is a letter dated September 26, 1921, written on the company's paper, at the head of which appear the names of the four directors, by Mr. John Nash, one of the four, to Mr. A. D. Eshelby, another of the four. It is marked "Strictly private and confidential," and after a full statement of assets and liabilities as on August 31, 1921, the writer goes on to point out the nature of the assets in some detail and the purposes for which the additional capital of 30,000*l.* is required, and concludes: "I shall be very happy to discuss this proposition in all its details with any one who is really interested." Enclosed with the letter was a list of customers with whom accounts were open on August 31, and attached was a form of application for ordinary shares in the same terms, mutatis mutandis, as the one for preference shares attached to the first document.

These documents were composed by the defendant, Mr. John Nash; the first was, as I have said, signed by him and his three co-directors; several copies—certainly a dozen, possibly twenty to thirty—were typed, and one at least of these was handed or sent to Mr. A. D. Eshelby, also a director, not with a view to his showing it to any particular individual but to assist him in his quest for some person or persons willing to find the additional capital. It appears from the correspondence that he had already been making efforts in that direction before September 26, and on the 12th of the month had been supplied with a written statement bearing that date and containing most, if not all, of the information to be found in the documents of the 26th.

Amongst the individuals to whom Mr. Eshelby had spoken on the subject, before September 26, was Mr. James Alcock, a solicitor of Liverpool, and on receipt of the documents from Mr. Nash he at once wrote the following letter to Mr. Alcock. "Further to our previous conversation, I now

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have pleasure in enclosing information concerning the proposition as follows :—(1.) General scheme for increase of capital as laid before the board of directors together with general particulars. This scheme is merely a basis and could be altered to accommodate any party proposing to invest a substantial sum. (2.) A personal letter from the managing director, giving more specific information. This is for your confidential information and use. I understand you have wealthy clients who might be willing to become shareholders ; or you may know of some one who would like to start a son in a prosperous concern. In either case, I think, there would be no difficulty in accommodating the conditions to suit your clients. The additional capital is required wholly for development purposes." That letter is in substance a request to Mr. Alcock to find some client or clients willing to provide the new capital upon the terms proposed by the company or some modification thereof as an investment pure and simple, or, alternatively, as an investment coupled with a provision for a son. No limitation is imposed on the number or class of persons to whose attention the matter is to be brought. So long as the money is forthcoming, the source from which it comes is quite immaterial. Mr. Alcock's reply reads as follows : "Your letter of the 26th instant, with its various enclosures has come to hand, and I am much obliged to you for all the particulars you have sent me. I will go carefully through these and will take the earliest opportunity that arises of placing the matter before any of my friends to whom I think it may appeal. It may be some little time before I shall be able to report anything definite to you, but next week I am hoping to see some of my wealthy clients and will then see what can be done."

No information is forthcoming as to the extent to which Mr. Alcock placed the matter before his friends, but on October 4 he sent the papers to Major Wrigley, the plaintiff's brother-in-law. He in turn sent them to the plaintiff (an utter stranger to the company and its directors), who within a few days and after an interview with the defendant, whereat the various statements in the documents were discussed and their accuracy confirmed, agreed to and did in fact subscribe for 3000 ordinary shares for which he paid in full on October 25, and which were duly allotted to him on the 31st of the same month.

The shares having seriously depreciated in value, the plaintiff on June 18, 1926, brought this action, wherein he claimed to recover damages from the defendant Nash for fraudulent misrepresentations and for breach of statutory duty in not complying with s. 81 of the Companies (Consolidation) Act, 1908. On this appeal we are concerned only with the second claim.

The section in question requires that every prospectus—which by s. 285 means any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscriptions or purchase any shares—issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the promotion of the company must state particulars with regard to certain matters therein enumerated, and among them (*e*), "the number and amount of shares . . . . which within the two preceding years have been issued . . . . as fully or partly paid up otherwise than in cash . . . . and . . . . the consideration for which these shares . . . . have been issued." No attempt was made to comply with any of the requirements of the section in the documents of September 26. At the trial the plaintiff proved that had he known that of the 40,300 shares issued by the company before October, 1921, 30,000 had been issued to the vendors of the patents as fully paid, he would not have subscribed for the 3000 shares, and that he had suffered damage. The jury answered in the affirmative the question : Were the documents of September 26 an offer of shares made by the company to the public ? To the further question : Were these documents issued to the public ? they answered : "There is no proof of this." Judgment was not entered at the time, but after further argument on a subsequent date, the learned judge held that there was no evidence that the documents were ever issued to the public, and entered judgment for the defendant.

With all respect to the learned judge and my Lord, I cannot agree with that conclusion. In my opinion the documents were issued to the public when Mr. Eshelby wrote on September 26 to Mr. Alcock, asking him in substance to lay the proposition before his clients. That Mr. Alcock so understood it is obvious from his reply of the 28th, and that he did in fact bring it to the notice of one client, through whom it reached the plaintiff, is established.

The intention with which these documents were prepared must be determined by the construction properly imposed upon them; they were drafted by the managing director, and adopted and approved by the board collectively as an offer to the public to apply for shares, and for what purpose or with what intent were a dozen or two reproduced? If the answer were not obvious, it would surely be supplied by the fact that almost before the ink was dry upon them—on the very day on which the directors affixed their approving signatures—one of their body despatched a copy to Mr. Alcock with the sole object of tapping the mineral resources of that gentleman's "well-to-do clients."

It has been well said that the true office of the prospectus is to secure applications from the public, and when the concomitant conditions exhibit a company making desperate efforts to raise further capital—a board of directors settling and approving an invitation to the public, a reproduction of that invitation adequate for the purpose of reaching the limited section of the public likely to entertain the investment, an open appeal to all and sundry in whom Mr. Alcock may succeed in arousing interest, and the ultimate trickling of that appeal into the hands of an absolute stranger to the company and those who were in control of it—it is in my opinion impossible to resist the inference that the circulars were reproduced and in fact employed to fulfil the office of their existence, and to reach a section of the public from which it was anticipated a response might be forthcoming.

It is one thing for individuals engaged or interested in the formation of a company to possess themselves of details,

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even in the shape of an advanced copy of the prospectus, which may in due course be advertised or otherwise circulated, and to disclose the information so obtained to friends whose support they may wish to obtain or to whom they desire to point out an attractive investment, but quite another for the company, acting by the board, to hand the same details to any one or more of the directors or some other agent, and authorize him or them to utilize the materials for the very purpose for which they were brought into existence—the securing of subscriptions from all and sundry willing to make an offer on the forms so conveniently supplied with the information, and even on the former of these suppositions I think it might well be held that the document was in fact issued to the public, if it could be shown that the company authorized or was cognizant of the use which was being made of it.

The facts of this case are quite distinguishable from such a case as that of *Sherwell* v. *Combined Incandescent Mantles Syndicate* (1), where some of the directors, without any authority from the company, sent a prospectus marked "Not for publication," which is not the same as "issue," to their personal friends. Here the invitation was extended with the authority of the company broadcast to any outsider Mr. Alcock might introduce, and it is idle to suggest that if that gentleman had produced applications from a dozen or more of his clients—wealthy or otherwise—the company would have refused to accept their money.

Nor, with all respect, do I appreciate the relevancy of the argument based on the fact that the plaintiff's was the sole response. The question whether or not the prospectus was issued does not fall to be determined by the extent of its success or by the number of copies circulated. The absence of a single response would not negative issue if otherwise established, and I do not accept the view that any burden is cast upon the plaintiff to establish a circulation to others besides himself, if the circumstances proved are sufficient to establish an issue to him. Were it otherwise, the Court

(1) [1907] W. N. 110; 23 Times L. R. 482.

might find itself involved in an inquiry as to the number of copies circulated or issued, and there is certainly nothing in any of the reported cases to suggest that course. Moreover, one can easily conceive a case wherein the question of issue not being in dispute, the first individual applied to had agreed to provide all the capital required and had thereby obviated any necessity for further circulation. Could it be argued in such a case that the individual had lost the protection of s. 81 because the issue had been confined to him, and was not therefore an invitation issued to the public? And if so, at what numerical stage would the Court recognize the issue as an invitation to the public?

There is no definition in the Act of the word "public." Farwell J. in *Burrows* v. *Matabele Gold Reefs and Estates Co.* (1), where he was dealing with s. 8 of the Act of 1900, which commences with the words "Upon any offer of shares to the public for subscription," and which, as amended by the Act of 1907, is now reproduced in s. 89 of the Act of 1908, said (2): "I think that the clue to the meaning of the word 'public' as used in this Act is to be found in s. 10, sub-s. 4"—now s. 81, sub-s. 7—and a little lower on the same page, after reading the sub-section and the definition of the word "prospectus," he adds: "An offer is not the less made to the public because it is sent to shareholders or debenture holders as well as to other persons, or because it is not advertised in the public newspapers. But if it is sent solely to the shareholders or debenture holders of the company, there is no offer to the public. The distinction is between persons who are members or debenture holders of the company, on the one hand, and those who are not, on the other." In the present case I do not think it is necessary to resort to that construction of the word, which may indeed be a little too refined, regard being had to places in the Act where the word is used without any apparent contrast between members and outsiders. But the observations of the learned judge have never, so far as I know, been dissented from, and in construing the word in s. 81, where there is a contrast between

(1) [1901] 2 Ch. 23. (2) [1901] 2 Ch. 27.

members and outsiders, it may well be that his view ought to be adopted.

But, as I have already indicated, the plaintiff was, in my opinion, a member of the public in a wider sense of the word, ignorant of and unknown to the company and its directorate, to whom the existence of the company and its pecuniary requirements were first made known by what has been held to be "an offer of shares to the public," circulated on behalf of the company by its accredited agent through a particular channel, but with intent to obtain from all and sundry to whom its contents should be made known the much desired subscriptions. I cannot myself appreciate how such a procedure really differs except in detail from an advertisement in the public press addressed to all and sundry who choose to read it. In either case if the invitation falls short of the statutory requirements any invitee thereby led to take up shares, provided he satisfies the Court that he would not have applied for the shares had the invitation fulfilled the statutory requirements, is entitled to such remedy by way of damages as the Legislature has afforded him. In my opinion, the learned judge was wrong in holding there was no issue to the public, and the appeal ought to be allowed and judgment entered for the plaintiff for the damages awarded to him by the jury.

Appeal allowed.

Solicitors for appellant: *Lake & Son.*
Solicitors for respondent: *Godden, Holme & Ward.*

J. S. H.

[IN THE COURT OF APPEAL.]

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Landlord and Tenant—Rent Restriction—Statutory Tenant—Right to sublet—" Lawfully sublet "—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15, *sub-s.* 3—*Rent and Mortgage Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 2 ; *s.* 4, *sub-s.* 1 (*h*) ; *s.* 5 ; *s.* 7, *sub-s.* 1.

A statutory tenant of a dwelling-house holding upon terms which do not prohibit subletting may sublet part of the dwelling-house provided the remainder is not already sublet. His power to sublet is subject to apportionment of the standard rent of the dwelling-house.

The words " lawfully sublet " in s. 15, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and in s. 2, sub-s. 2 ; s. 4, sub-s. 5 ; and s. 7, sub-s. 1, of the Rent and Mortgage Restrictions Act, 1923, do not apply exclusively to a dwelling-house of which the tenant is a contractual tenant, but apply also to a dwelling-house of which the tenant is a statutory tenant.

Appeal from the judgment of a Divisional Court.

On September 13, 1915, one Jameson became tenant of a house at Isleworth, Middlesex, which was within the Rent Restriction Acts and of which a Mrs. Alders was the owner. The tenancy agreement contained no provision against subletting, and the tenant never subsequently agreed to any such restriction. On November 20, 1919, Mrs. Alders conveyed the house to the plaintiff. In October or November, 1921, the plaintiff served a notice to quit on Jameson, who thereupon became a statutory tenant of the house. On November 19, 1925, Jameson sublet to the defendant the rooms which were the subject matter of the present proceedings.

On July 20, 1926, the plaintiff obtained an order for possession of the house against Jameson for non-payment of rent, and on May 3, 1927, Jameson quitted the house, leaving the defendant in possession of the rooms which had been sublet to him, who, when requested to give up possession to the plaintiff, refused to do so. The plaintiff then brought an action in the Brentford County Court claiming an order for possession of the rooms.

The county court judge gave judgment for the plaintiff on the ground that a statutory tenant had no right to sublet, and that therefore the defendant was a trespasser. He so decided upon the authority of *Keeves* v. *Dean.* (1)

On appeal the Divisional Court (Shearman and Finlay JJ.) affirmed the decision of the county court judge.

The defendant appealed.

Doughty K.C. and *Schultess-Young* for the appellant. This case raises the question which was expressly reserved in *Keeves* v. *Dean* (1) and *Campbell* v. *Lill* (2)—namely, whether, if a statutory tenant sublets part of the premises of which he is the statutory tenant, remaining in possession of the rest, and not being prohibited from subletting by any of the terms and conditions on which he holds, his tenant is entitled to the protection of the Rent Restriction Acts. Whatever the interest of a statutory tenant in the dwelling-house may have been originally—in *Keeves* v. *Dean* (3) Lush J. described it as "nothing more than a status of irremovability" and as "a purely personal right to be free from disturbance by his landlord"—there can be little doubt that the successive Acts have gradually invested it with the character of an estate which now hardly falls short of being assignable in the full sense. It can be assigned by operation of law, in that it vests in the trustee in bankruptcy of the tenant as "property" within the meaning of s. 167 of the Bankruptcy Act, 1914: *Parkinson* v. *Noel.* (4) The executor of a statutory tenant is entitled to remain in the dwelling-house as a person deriving title under the testator: *Collis* v. *Flower* (5); and the same applies to an administratrix: *Mellows* v. *Low.* (6) It is true that in this Court it cannot be argued that it is assignable by act of the party inter vivos: *Keeves* v. *Dean* (1); but since the Act of 1920, by s. 12, sub-s. 1 (*g*), the widow of a statutory tenant dying intestate, who was residing with him at the time of his death; or, if he leaves no widow, some member of his family, is included in the expression "tenant." Sect. 5 of the Act of 1920 as amended by s. 4 of the Act of 1923 (1) expressly mentions the sub-tenant of a tenant, and speaks of subletting the whole of the dwelling-house "or part of the dwelling-house, the remainder being already sublet": see sub-s. 1 (*b*) and (*h*); and the later Act was passed at a time when by far the greater number of dwelling-houses to which the Act applied were occupied by statutory tenants. Sub-s. 5 of the same section also speaks of "any sub-tenant to whom the premises or any part thereof have been lawfully sublet." Subletting and sub-tenancy are expressly mentioned in the Act of 1923, in the provisoes to s. 2, sub-ss. 1 and 2, in s. 7, sub-ss. 1, 2 and 3, and in s. 9, sub-s. 1. Sect. 8, sub-s. 1, of the Act of 1920 also recognized sub-tenancies of dwelling-houses to which that Act applied, and at the passing of that Act a number of those dwelling-houses must have been inhabited by statutory tenants; and s. 15, sub-s. 3, of the same Act points still more clearly to the conclusion that the Legislature contemplated the exercise by a statutory tenant of a power to sublet.

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(1) [1924] 1 K. B. 685.
(2) (1926) 135 L. T. 26.
(3) [1924] 1 K. B. 686, 697.
(4) [1923] 1 K. B. 117.
(5) [1921] 1 K. B. 409.
(6) [1923] 1 K. B. 522.

[*Dick* v. *Jacques* (2) and *Reeves* v. *Davies* (3) were also cited.]

Sidney Isaacs for the respondent. The decision of the Divisional Court is supported by the opinion of Swift J. in *Aston* v. *Smith* (4), that a statutory tenant "cannot assign, sublet or demise" his statutory tenancy "or deal with it in any way"; and by the opinion of Greer J. concurred in by Salter J. in *Gidden* v. *Mills* (5), that "a tenant who has sublet the whole of the premises let to him is outside the protection of the Act"; i.e., the Rent Restriction Act of 1920; and also by the decision of Salter and Talbot JJ. in *Wheeler* v. *Smith*. (6) A statutory tenant is not really a tenant at all:

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(1) See note on pp. 141 et seq. post.

(2) (1920) 36 Times L. R. 773.

(3) [1921] 2 K. B. 486.

(4) [1924] 2 K. B. 143, 146.

(5) [1925] 2 K. B. 713, 725.

(6) (1926) Unreported. See the Estates Gazette, May 14, Digest of Cases. The case was not reported by a member of the Bar, but Mr. Havers and Mr. G. H. L. Jacob, who were counsel in it, vouched for the accuracy of the report.

Remon v. *City of London Real Property Co.* (1) He cannot avail himself of the provisions of s. 212 of the Common Law Procedure Act, 1852, or of s. 14 of the Conveyancing Act, 1881: *Brewer* v. *Jacobs.* (2) He is in the position of a licensee or of the holder of a lien; he has no right that he can pass on to another; such right as he has is extinguished if he attempts to part with it. There is no distinction for the present purpose between assigning and subletting. A statutory tenant cannot assign: *Keeves* v. *Dean.* (3) The reasoning of that case completely covers the present. The statutory tenant holds upon the terms and conditions of his original tenancy; but a right to sublet or a right to assign is not one of the terms and conditions of a tenancy, but an incident of the estate, if it may be so called, which a lessee or other contractual tenant possesses. A statutory tenant has no estate. His interest passes to his trustee in bankruptcy, not because it is a proprietary interest in any sense of the words, but because of the very wide interpretation of the word "property" in s. 167 of the Bankruptcy Act, 1914, as including "every description of estate, interest and profit." The general intention of the Rent Restrictions Acts is that what is called the statutory tenant should have merely a right to be left undisturbed. This is clear from s. 15, sub-s. 1, of the Act of 1920, which lays down the conditions of a statutory tenancy. The tenant shall, "so long as he retains possession," observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, and shall be entitled to give up possession of the dwelling-house "only on giving such notice as would have been required under the original contract of tenancy"—that is to say a valid notice to quit—or on giving not less than three months' notice. If the original contract of tenancy enables him to sublet he may lawfully sublet. Then by s. 15, sub-s. 3, when the interest of the tenant is determined the sub-tenant "to whom the premises or any part thereof have been lawfully sublet" is deemed to be the tenant of the landlord. Sect. 5,

(1) [1921] 1 K. B. 49, 54, 57. (2) [1923] 1 K. B. 528.
(3) [1924] 1 K. B. 685.

sub-s. 5, protects from the effect of an order against the tenant "the right of any sub-tenant to whom the premises or any part thereof have been lawfully sublet." Again the provisoes to s. 2, sub-ss. 1 and 2, of the Act of 1923 save from the decontrolling operation of that Act part of a dwelling-house "lawfully sublet." The same phrase "lawfully sublet" occurs in s. 4, sub-s. 5, and in s. 7, sub-s. 1. All these sections point to tenancies created by a contractual, as distinguished from a statutory, tenant, whose contract of tenancy permits him to sublet or does not prohibit him from subletting. When the object of the Rent Restriction Acts is considered, surely that object was attained when the tenant himself was secured in his occupation. What possible reason was there for enabling him to sublet after he had been so secured? There is very good reason for restricting the words "lawfully sublet" to tenancies created by tenants who hold on contractual tenancies not prohibiting subletting, but no reason at all for enabling a statutory tenant to sublet.

[The following cases were also cited: *Cottell* v. *Baker* (1); *Ward* v. *Larkins* (2); and *Leslie* v. *Cumming*. (3)]

Doughty K.C. in reply. By s. 4 of the Act of 1923 it is enacted that "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless," etc. Does this enactment apply only to contractual tenants? Can orders and judgments for the recovery of possession be freely given against statutory tenants? Only one answer is possible; it applies to statutory tenants as well as to contractual tenants. Then by sub-s. 1 (*h*) an order or judgment is not to be made against a statutory tenant unless the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet. Then if he sublets part of a dwelling-house when the remainder is not already sublet, an order or judgment cannot be made against him; in other words he may lawfully sublet part of a dwelling-house when the remainder has not already been sublet.

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(1) [1920] W. N. 46.

(2) [1923] W. N. 189.

(3) [1926] 2 K. B. 417.

Cur. adv. vult.

1928. Jan. 30. The following written judgments were delivered:—

Scrutton L.J. This appeal raises a question of great importance to a number of persons in occupation of a few rooms in houses of low rental and rateable value. The question is whether they have a good title to be in those rooms when their only title depends on a subletting by a person who himself had only a tenancy under the Rent Restriction Acts, and who is not in by the consent of his landlord, but because his landlord can only turn him out under conditions limited by those Acts. In other words, can a statutory tenant sublet part of the premises of which he is a statutory tenant? The phrase "statutory tenant" comes from the marginal note to s. 15 of the Act of 1920, "conditions of statutory tenancy," which is not part of the Act, but applies to the person who, in s. 15, is described as a person "who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies." The Courts have interpreted this as referring to the provisions of s. 5 of the Act of 1920, and s. 4 of the Act of 1923, which prevent a landlord from getting rid of a tenant whose contractual tenancy has expired, except under the provisions of those sections. He stays in, not by the will of the landlord, who may desire to get rid of him, but by the provisions of the statute: *Remon's* case. (1) But as I said in that case, Parliament originally "omitted expressly to provide what sort of a legal interest the person who stayed in by permission of Parliament and against the will of the landlord" should have. The definition in s. 15 of the Act of 1920, that "so long as he retains possession" he "shall . . . . observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act," did not help very much when one came to the practical facts of life, and I think citizens are entitled to complain that their legislators did not address their minds to the probable events that might happen in cases of statutory tenancy, and consider how the legal interest they were granting was affected by those probable events. For instance: (1.) Can a statutory tenant dispose of his statutory tenancy by will? (2.) What happens to his statutory tenancy if he dies intestate? (3.) What happens to his statutory tenancy if the tenant becomes bankrupt, and his trustee (*a*) does not disclaim, (*b*) disclaims? (4.) Can a statutory tenant assign all his interest (*a*) for value, (*b*) without consideration, but under seal? (5.) Can he sublet (*a*) all his interest by several sub-tenancies, (*b*) part of his interest by a sub-tenancy of part of the premises? (6.) Can he, retaining possession and control of the premises and living in them, let unfurnished rooms to lodgers?

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(1) [1921] 1 K. B. 49, 57.

I think it is pretty evident that the Legislature never considered as a whole the effect on the statutory tenancy of such ordinary incidents as death, bankruptcy, voluntary assignment, either inter vivos or by will, a total or partial subletting; but from time to time put into one of the series of Acts a provision as to one of those incidents without considering how it fitted in with the general nature of the tenancy which those incidents might affect. Take, for instance, intestacy: Parliament in 1915 by s. 2, sub-s. 1 (*d*), of the Act of 1915, defined tenant as "including persons from time to time deriving title under the tenant." This appears to show that in some instances, at all events, the statutory tenant might pass on his statutory interest to others. Whether or not the Legislature thought of persons entitled under the Statute of Distributions does not appear; but in 1920, by s. 12, sub-s. 1 (*g*), of the Act of 1920, there was introduced, in addition to persons deriving title under the tenant, the widow of a tenant dying intestate who was residing with him at the time of his death, or, where a tenant dying intestate leaves no widow, or is a woman, such member of the tenant's family so residing as aforesaid as may be decided, in default of agreement, by the county court. What would happen if those entitled under the Statute of Distributions, say a child not resident in the house, dispute with the widow or with a child resident in the house; or who are to agree, whether all those entitled under the statute or all members of the family resident in the house, is left in obscurity. In *Mellows* v. *Low* (1), where there was intestacy but no notice to quit had been given to the tenant, and no member of the family resided in the house, and the administratrix did not reside in the house, the latter was treated as having title against the landlord, she being a person deriving title from the tenant. But the Legislature does apparently there recognize that the tenant may have an interest which passes to some one else on his death, and is not only personal to him living.

Take a will. The statutes say nothing about this, except the definition of tenant as including persons deriving title under him, and as, curiously enough, no statutory tenant seems to have left a will under which the rights of a devisee of the statutory tenancy have come in question, the Courts have said nothing. In *Collis* v. *Flower* (2), where a non-resident executor was treated as a tenant, the death occurred during the contractual tenancy, and before notice to quit had been given. The question of statutory tenancy did not therefore arise. As appears hereafter, the statutory tenant cannot assign inter vivos his interest, and therefore it seems very improbable that he can assign by will, but it does not seem that the Legislature considered the matter at all.

Take next involuntary assignment to a trustee by bankruptcy. Again, except that "tenant" includes persons deriving title through a tenant, there is no indication that the Legislature thought about the matter. The Courts have had to deal with the question. In *Reeves* v. *Davies* (3) during the currency of a contractual tenancy the tenant became bankrupt, the trustee disclaimed, and the landlord claimed possession. The Court of Appeal held he was entitled to it by reason of the trustee's disclaimer. They held that the bankrupt did not become a statutory tenant when the person to whom his interest had passed under the wide definition of property in the Bankruptcy Act disclaimed the lease. But this and the next case show that in certain circumstances the interest of the original tenant may pass to another by operation of law, and is not therefore merely personal to him; for in *Parkinson* v. *Noel* (1) the bankruptcy of the tenant occurred while he was a statutory tenant, the trustee disclaimed, the landlord claimed possession from the statutory tenant, and the Courts gave the landlord possession. Again the statutory tenant is treated as having an interest which may pass to another.

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(1) [1923] 1 K. B. 522.
(2) [1921] 1 K. B. 409.
(3) [1921] 2 K. B. 486.

Take next the case of a voluntary assignment during life. The statutes until 1923 only gave help in two respects. There was the definition that "tenant" included those deriving title from him; and s. 15, sub-s. 2, of the Act of 1920, providing that a tenant retaining possession should not, as a condition of giving it up, receive any consideration from any person other than the landlord. In *Keeves* v. *Dean* (2) and *Nunn* v. *Pellegrini* (2), two assignments for value by statutory tenants to third parties came before the Court of Appeal. All three members of the Court held them bad as contrary to the Act, in that the assignor received value from the assignee. But two members of the Court also held the assignments ineffective on a different ground. They said that a statutory tenant under s. 15, sub-s. 1, of the Act of 1920 was entitled to all the terms and conditions of the original contract of tenancy, but that the right to assign the original tenancy was not a term or condition of the original contract of tenancy, but an incident of the tenancy created by the original contract, which therefore did not pass to the statutory tenant, who had only a personal right, which he could not assign to any one else. I did not agree with this, as I thought it was too narrow a construction of

(1) [1923] 1 K. B. 117.

(2) [1924] 1 K. B. 685.

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the phrase "terms and conditions of the original contract of tenancy," which I thought included rights resulting from the grant in the contract, and I did not see how it fitted in with the previous decisions that the interest of the statutory tenant passed on bankruptcy to the trustee, or, as I thought, with the express provisions as to intestacy.

But it is to be noted that the facts on which the decision in *Keeves* v. *Dean* (1) was based arose, and the action was commenced before the Act of 1923 came into operation, and s. 4, sub-s. 1 (*h*), of that Act was not applicable and was not cited to the Court. That sub-section made any assignment after July 31, 1923, without leave of the landlord a ground on which the Court might eject the tenant, and it now seems clear therefore that whether an assignment is for value, or without consideration but under seal, it may be used for ejecting the tenant, presumably because in the opinion of the Legislature his interest as statutory tenant was not one that he could assign, in that by assigning he would cease to retain possession within the meaning of s. 15, sub-s. 1, of the Act of 1920.

This brings one, after a too lengthy preamble, the justification for which is the obscurity of the Acts, to the question in this case. Can the statutory tenant, while in possession, sublet part of the premises he holds under his tenancy, remaining in possession of the rest of the premises? I can quite understand and sympathize with the Divisional Courts which approached this question on the lines of the reasoning of two of the judges in *Keeves* v. *Dean.* (1) They would say the right to sublet part of a contractual tenancy in cases where there is no express provision to the contrary in the contract, is not a "term or condition of the contract," but only an incident of the tenancy thereby created. It does not therefore pass to the statutory tenant, who has only a personal right to occupy so long as he observes the terms and conditions, which does not enable him to exercise other incidents of the grant than that of occupying the demised premises. Consequently two Divisional Courts said the

(1) [1924] 1 K. B. 685.

statutory tenant cannot sublet even part of the demised premises: this is the view of Shearman and Finlay JJ. in the judgment appealed from, where a sub-tenancy of part was created by the statutory tenant, who has himself now been ejected from the rest of the premises. It is also the view of Salter and Talbot JJ. in *Wheeler* v. *Smith* (1), reported in the Estates Gazette Digest of Cases, a report which was certified by counsel engaged in it as being a correct report. It was also the view of Swift J. obiter in *Aston* v. *Smith*. (2) On the other hand Greer J. before the decision in *Keeves* v. *Dean* (3) had in *Parkinson* v. *Noel* (4) stated also obiter that a statutory tenant could sublet.

But certain matters have to be considered: First, the two Lords Justices, who expressed their opinion as to the personal right on the ground that incidents of tenancy or estate did not pass, expressly reserved the question as to subletting the whole or a part of the premises. Bankes L.J. in *Keeves* v. *Dean* (5) said: "I say nothing about subletting, because it may be that a statutory tenant who has sublet part only of the premises which he claims the right to retain and which he occupies is still entitled to the protection of the statute. What the position would be if he were to sublet the whole of the premises, and whether under those circumstances any distinction could be drawn between subletting and assignment, it is not necessary here to determine, and I do not decide it." Lush J. puts the difficulty in the assignor's giving up possession on assignment, which he does not do in partial subletting. Secondly, the provisions of the Act of 1923, s. 4, sub-s. 1 (*h*), apply to this case, and did not apply to *Keeves* v. *Dean* (3), and were therefore not considered by the Court: and that sub-section only reserves as one of the grounds of ejectment the subletting of part of the dwelling-house, the remainder being already sublet. That is to say, it does not treat as a ground of ejectment subletting of part of the premises, the statutory tenant living in the house

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(1) See ante, p. 119, note (6).

(2) [1924] 2 K. B. 143, 146.

(3) [1924] 1 K. B. 685.

(4) [1923] 1 K. B. 117, 119.

(5) [1924] 1 K. B. 693.

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part of which he sublets, but only a series of sublettings which between them account for the whole of the house, and leave the statutory tenant out of possession of the premises. Some explanation of the presence of this provision may be found in the fact that the decision of the Court of Appeal and House of Lords in 1922 and 1923 in *Chatterton* v. *Terrell* (1) had just brought to attention the effect of a tenant, who could not sublet the whole of his premises, making two partial sublettings which in effect sublet the whole demised premises. It is very difficult after this s. 4, sub-s. 1 (*h*), to say that the statutory tenant cannot sublet part of the premises, when the landlord is not given power to eject him for doing so. It is true that this provision has very odd results. A., the statutory tenant of a house of nine rooms, sublets three to B., and three more to C.; these sublettings apparently will not be grounds for his ejection by the landlord. He then sublets the last three rooms to D., and this apparently will justify the landlord in ejecting him from the whole of the premises. Will the sub-tenants be able to say under s. 5, sub-s. 5, of the Act of 1920, that the premises have been lawfully sublet? or will B. and C. be able to say it, but not D.? though the ground of ejectment of A. is the subletting to B., C. and D.; and not any one subletting. The same point will arise under s. 15, sub-s. 3, of the Act of 1920, which for some reason which I cannot understand has been added to s. 5, sub-s. 5, of the same Act. Thirdly, a case where the provision of s. 4, sub-s. 1 (*h*), of the Act of 1923 was applicable came before Bankes and Warrington L.JJ., sitting as a Divisional Court, in *Campbell* v. *Lill.* (2) There the statutory tenant sublet part of the premises, remaining in possession of the rest, and the landlord endeavoured to eject him. Warrington L.J. said he agreed with the opinions of Bankes L.J. and Lush J. in *Keeves* v. *Dean.* (3) Bankes L.J. then had to decide the question he had reserved in *Keeves* v. *Dean* (3), whether a statutory tenant who sublets part is entitled to, or has lost the protection of the statute. He and

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(1) [1923] A. C. 578.
(2) 135 L. T. 26.
(3) [1924] 1 K. B. 685.

Warrington L.J. did not say subletting of part is an incident of estate but not a term or condition of the tenancy, or that therefore the power to sublet part did not pass under s. 15, sub-s. 1, of the Act of 1920, to the statutory tenant, who has only a personal right. On the contrary, they took the view that the statutory tenant was protected by the omission in s. 4, sub-s. 1 (*h*), of the Act of 1923, of any mention of subletting only part of the premises. I personally find it very difficult to see how the statutory tenant could be protected from any consequences of subletting part, and yet his sub-tenant of part could be expelled. If the statutory tenant could not by reason of his statutory tenancy sublet part, he had by subletting part violated a condition of tenancy under the Act, and so become liable to ejectment under s. 5, sub-s. 1 (*a*), of the Act of 1920 and s. 4, sub-s. 1 (*a*), of the Act of 1923, but he was held not liable to ejectment. Under these circumstances I find it impossible to hold the decision of the majority as to assignment under s. 15, sub-s. 1, of the Act of 1920, binding on a question of partial subletting under s. 4, sub-s. 1 (*h*), of the Act of 1923. But, further, in my view the continual references throughout the Acts to partial subletting and sub-tenancies must be treated as an indication that in the opinion of Parliament a statutory tenant remaining in possession might sublet part of his demised premises. The references are sometimes to sub-tenants, sometimes to tenants to whom the premises are lawfully let; I find it impossible to explain them by limiting them to sub-tenants created by a contractual and not by a statutory tenant. It is impossible to ignore the fact that there are a very large number of the latter class, for every landlord who has raised his rent by virtue of the Acts, and every tenant who has done the same to a sub-tenant, has only done so because of statutory tenancy. Sect. 7 of the Act of 1923 empowers the tenant to increase the rent of his sub-tenant by a certain percentage, and s. 3, sub-s. 1, of the Act of 1920, shows that this increase cannot apply to a contractual tenancy lawfully made by the tenant; it would seem to follow that s. 7 must relate to and recognize sub-tenancies created by statutory tenants. Again, why should s. 4, sub-s. 1 (*h*), of the Act of 1923, make no mention of partial subletting by a tenant unless a statutory tenant had in the view of the Legislature a right to sublet part of his holding. Sect. 1, sub-s. 1 (*b*), of the Increase of Rent, &c. (Amendment), Act, 1919 (9 & 10 Geo. 5, c. 90), when it speaks of the tenant not being ejected unless, amongst other things, by subletting the house or any part thereof, or by taking in lodgers, he is making an unreasonable profit, must have been dealing with statutory tenants amongst others, though as to subletting the whole house, it is now extended by s. 4, sub-s. 1 (*h*), of the Act of 1923, already referred to. From these and other provisions I have come to the conclusion that the Rent Restrictions Acts contemplate that the statutory tenant remaining in possession might sublet part of his premises, subject to apportionment of the standard rent of the tenant's premises, so as to prevent the sub-tenant from paying an extortionate rent. He cannot, however, assign his tenancy of the whole of the premises, whether for value or not. Nor can he by a series of sublettings part with the whole of the premises which he holds as statutory tenant, though if he does so I desire to reserve the question of the position of the sub-tenants. I would also point out that the questions: (1.) Whether the persons occupying part of the house in which their landlord resided, though described as sub-tenants were not really lodgers, and (2.) what the effect would be if they were lodgers, were not raised in the Courts below, and were not therefore considered in this Court.

For these reasons I am of opinion that an order for ejectment should not have been made against the sub-tenant in this case, and his appeal must therefore be allowed and judgment entered for him with costs here and below. I regret that I cannot order the costs to be paid by the draftsmen of the Rent Restrictions Acts, and the members of the Legislature who passed them, and are responsible for the obscurity of the Acts, and their failure clearly to provide for such obvious incidents of tenancy, as death with or without a will, bankruptcy, power to assign, and power to sublet in whole or in part demised premises.

SARGANT L.J. I am of the same opinion. In considering the decision of the Divisional Court here it is of great importance to see what was the argument which was presented to them on the part of the sub-tenant Russell and which their judgment negatived. Put shortly it was this. Jameson, the tenant of the whole, was not prohibited by his original contract of tenancy from subletting part; this ability to sublet was one of the terms and conditions of his original contract, which, under s. 15, sub-s. 1, of the Act of 1920, became applicable to his subsequent statutory tenancy; and therefore the sub-tenancy created by him in favour of the defendant, Russell, was a lawful subletting and is preserved against the landlord by sub-s. 3 of s. 15, notwithstanding the determination of the statutory tenancy of Jameson. Now this argument is directly in conflict with the reasoning of the majority of the Court of Appeal in *Keeves* v. *Dean* (1), which probably binds us and with which, moreover, I agree. For when once the conclusion is reached that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property, it is difficult to apply to him, as part of the terms and conditions of his former tenancy, rights essentially incidental and due to the possession of property.

It was to this argument, and this argument alone, that the decision of the Divisional Court was, as I read it, directed. Shearman J., for instance, puts it thus: "I cannot understand how the right to sublet can be considered to be one of the 'terms and conditions of the original contract of tenancy' when the right to assign is not," and Finlay J., after quoting the view of Lush J. as to the purely personal character of the statutory tenant's rights, says: "It seems to me to follow that the statutory tenant . . . . cannot sublet for precisely the same reason—namely, that he has no estate out of which the subletting can be carved." And it would seem that the decision of another Divisional Court, consisting of Salter and Talbot JJ. in a case of *Wheeler* v. *Smith* (1), reported and, as we are told through counsel, accurately reported in the Estates Gazette Digest of Cases, was founded on reasoning similar to that of Shearman and Finlay JJ. in the present case. In rejecting the foregoing line of argument on behalf of the sub-tenant, the Divisional Courts appear to have been right. And it may be further noted that, even if the statutory tenant had the same estate as he previously had as a contractual tenant, that alone would not avail the sub-tenant. For a contractual tenant, though entitled under his contract to sublet part, obviously cannot give his sub-tenant an estate exceeding in duration his own estate.

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(1) [1924] 1 K. B. 685.

Before this Court, however, the argument for the appellant sub-tenant has taken a much wider range, and has been of a much more cogent character. Mr. Doughty has founded himself mainly on the proposition that the statutory tenant is the creation of statute, and has such rights as the various Acts have given him, either expressly or impliedly; and that an examination of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and of the Rent and Mortgage Interest Restrictions Act, 1923 (which two Acts are hereinafter referred to briefly as the Act of 1920 and the Act of 1923 respectively), shows that the Legislature has recognized the power of statutory tenants to create sub-tenancies, and has provided protection for these sub-tenants, independently of the continuance of the statutory tenancy of the statutory tenant. To appreciate this argument, it is necessary to consider the general position of tenants of small properties at the time when the Acts of 1920 and 1923 were passed.

There can, I think, be no doubt that Mr. Doughty was right in his view, that at both of these dates, and particularly at the time of the operation of the latter Act (July 31, 1923), the vast majority of the tenancies of the properties to which the Acts applied had ceased to be contractual tenancies and had become statutory tenancies. For landlords had naturally taken advantage of the intermediate legislation enabling them to make the statutorily authorized increases in the rents payable to them, and had for the most part (at any rate in England) adopted the method strictly necessary for that purpose of giving notices to determine existing contractual tenancies and subsequently giving notices of the appropriate permitted increases. And even in those cases (most common in Scotland) where landlords had adopted the method, subsequently held to be ineffective—see *Kerr* v. *Bryde* (1)—of giving merely a notice of increase of rent, the error had been cured retrospectively by the Rent Restrictions (Notices of Increase) Act, 1923, which came into operation on June 7, 1923.

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(1) See ante, p. 119.

There can also be no doubt that both contractual tenants, while their tenancies remained contractual, and statutory tenants, whether originally contractual or not, had in innumerable cases, particularly having regard to the notorious deficiency of housing accommodation, and whether they were strictly entitled to do so or not, let or affected to let portions of their premises to sub-tenants; and so far as the position and rights of these sub-tenants were concerned the cases appear to be divisible, at the time of the passing of the Acts of 1920 and 1923, into four classes—namely, (1.) Sub-tenants holding under tenants who still held on contractual tenancies, which did not prohibit the subletting of part. (2.) Sub-tenants holding under tenants who still held on contractual tenancies which prohibited subletting of part. (3.) Sub-tenants holding under statutory tenants who had previously held on contractual tenancies which had prohibited subletting of part. (4.) Sub-tenants holding under statutory tenants who had not previously held on contractual tenancies which had prohibited subletting of part. And since, as already stated, the number of statutory tenants was very much greater than the number of tenants still holding on contractual tenancies, the number of sub-tenants in classes 3 and 4, that is holding from statutory tenants, was, at the dates of operation of the two Acts of

(1) [1923] A. C. 16.

1920 and 1923, and particularly at the latter date, enormously in excess of the sub-tenants in clauses 1 and 2—namely, those holding from tenants whose tenancies were still contractual.

Further it is necessary to bear in mind the great practical difference between the assignment or parting with the possession of the whole of the premises held by a tenant on the one hand, and the subletting of a portion of those premises on the other hand. In the first case the direct personal relationship between the landlord and the tenant, as such, is completely put an end to. But in the second case that direct personal relationship still remains, although, as regards a portion of the premises, and as between the tenant and the sub-tenant themselves, a new contractual relationship is created with which the landlord is not directly concerned, apart from any breach of contract in cases where the tenant was expressly prohibited from subletting part. It may well be that a non-prohibited sub-tenancy of this kind may not have all the legal characteristics of a full legal tenancy, such as the existence of a reversion in the sub-landlord to which rent is incident, and which would involve full powers of assignment of the interest of either the sub-landlord or the sub-tenant. But it may still create a personal contractual relationship between the sub-landlord and sub-tenant which will subsist during the existence of the superior tenancy of the sub-landlord in respect of the whole premises. It is to be remembered that at common law a lease merely created personal contractual rights and gave nothing of the nature of indestructible estate to the lessee. It was only by the Statute of Gloucester that the lessee was first protected against having his position destroyed: see Challis on Real Property, 3rd ed., p. 426. And it was not till the reign of Henry VIII. that the full assignability of the relationship of the lessee to the lessor and vice versa was completely established. Indeed in practice, when an individual is placed, as the statutory tenant undoubtedly was, in the position of having an exclusive personal possession of his premises, he is necessarily in a position in which he can place a third person in actual possession of a part of the premises, while retaining possession of the remainder, and that totally irrespective of whether his own right to exclusive undisturbed possession is purely personal or amounts to something of the nature of an estate or interest in the premises. And from this point of view it is of interest to refer to the comparatively recent case of *Grove* v. *Portal* (1), where a mere exclusive licensee of fishing rights, restrained in terms from underletting (that is from underletting the whole rights), was nevertheless held entitled to grant a sub-licence to two "rods" to participate in the fishing rights with him. The landlords of statutory tenants were not, in view of the exclusive possession of the tenants, able to discriminate between those whom the tenants took as lodgers and those whom they affected to take as sub-tenants. And these last named persons were in a position which, during the retention by the statutory tenants of their relationship towards their landlords, was practically indistinguishable from that of sub-tenants holding under ordinary sub-tenancies from contractual tenants.

Bearing these considerations in mind, then what is the true interpretation to be put upon the Act of 1920 and the Act of 1923, and, I may add, on s. 1 (*b*) of the Increase of Rent, &c. (Amendment), Act, 1919, where they refer to and obviously recognize the creation and existence of sub-tenancies? Mr. Isaacs in his careful and able argument for the respondent landlord insisted, and indeed was bound to insist, that the sub-tenancies referred to throughout were merely those in the first of the four classes to which I have referred above —namely, sub-tenancies from tenants who still held on contractual tenancies not prohibiting subletting. But to confine these references to this very minute class of sub-tenancies is, in my judgment, to place altogether too narrow an interpretation on this legislation, and indeed, in some cases, to come into conflict with the fairly obvious meaning of the passages in question. For instance, s. 1 of the Increase of Rent, &c. (Amendment), Act, 1919, is a section which must, I think, be referring to and protecting statutory tenants, and if this is so, sub-head (*b*) of that section refers to and recognizes sub-tenancies existing under statutory tenants, and indeed treats them, for the purposes of that sub-section, as standing in very much the same position as lodgers of the statutory tenants.

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(1) [1902] 1 Ch. 727.

Again s. 8 of the Act of 1920 would seem to apply quite clearly to statutory tenants; and, if this is so, there is great difficulty in limiting the sub-tenancies referred to in the proviso to that section to sub-tenancies created by tenants who still held by virtue of contractual bargains only. And in s. 12, sub-s. 1 (*g*), of that Act the extension of the meaning of "tenant and tenancy" to include sub-tenant and sub-tenancy, and the extension of the meaning of "let" to include sublet, seem to me incompatible with a limitation of these expressions to the very limited class of sub-tenancies to which Mr. Isaacs sought to restrict the operation of the Act of 1920. Even more clearly inconsistent with that restricted meaning is the language of s. 4 of the Act of 1923, substituting a new section for s. 5 of the Act of 1920. That new section is obviously applicable to statutory tenants generally; and, this being so, sub-s. 1, head (*b*), of that section must be read as recognizing sub-tenants of statutory tenants and classing them for the purposes of the sub-section with persons "residing or lodging with" them. And sub-s. 1, head (*h*), of that section, while making an assignment by the statutory tenant or a sub-letting or sub-lettings by him of the whole of his dwelling-house, an event on which a judgment of ejectment may be made, obviously treats a mere subletting of part as an event which does not involve a liability to forfeiture.

Sect. 4, sub-s. 1 (*h*), of the Act of 1923 was not relied on, or even referred to, in *Keeves* v. *Dean* (1), probably because the material facts in that case had occurred before the Act of 1923 had come into operation. But it was referred to and formed the main ground of the decision in the subsequent case of *Campbell* v. *Lill* (2), decided by a Divisional Court

(1) [1924] 1 K. B. 685.

(2) 135 L. T 26

consisting of Bankes and Warrington L.JJ. The latter judge pointed out that on all sound canons of interpretation the word "tenant" should be given the same meaning in every part of the section. This is a strong authority in favour of the view that the section is not limited to contractual tenancies, but comprises statutory tenancies, and therefore recognizes sub-tenancies of parts of the premises included in statutory tenancies. Mr. Isaacs laid some stress on the circumstance that in some parts of the legislation in question, such as s. 5, sub-s. 5, and s. 15, sub-s. 3, of the Act of 1920, and s. 2, sub-s. 2, s. 4, sub-s. 5, and s. 7, sub-s. 1, of the Act of 1923, reference is made to "lawful subletting"; and he argued that this was but the more formal expression of what are referred to merely as "subletting" or "sub-tenancies" in other sections of the two Acts, and that this confirmed his suggestion that under either form of expression all that was being dealt with was the first of the four classes of cases which have been set out above—namely, sublettings effected by tenants still holding under contractual tenancies that did not prohibit the subletting of part of the premises. But I can see no reason for thinking that this phrase has so narrow a meaning. It will be remembered that under the scheme of the Acts, where a contractual tenancy prohibited the subletting of part of the premises, the resulting statutory tenancy being "on the same terms and conditions" would also prohibit the subletting of part. And I think that the phrase "lawfully sublet" is amply and properly satisfied by being held to refer either to this first class of sub-tenancies or to the fourth class of sub-tenancies above referred to, that is to sub-tenancies under statutory tenants who had not previously held on contractual tenancies which had prohibited the subletting of part of the premises.

A further argument for the respondent was that the Legislature could hardly have intended to subject landlords, not only to the creation of an irremovable class of tenants, but also to the possible and indeed almost inevitable creation of a number of sub-tenants of portions of the demised premises. But in my judgment this argument was effectively countered by Mr. Doughty, who pointed out that even on the respondent's view this was the result with regard to all premises comprised in tenancies which still remained contractual and were not subject to a prohibition as to partial subletting; and that if once it were thought expedient to subject any landlords to such an increased burden, there seemed to be no reason why this burden should be cast on those landlords only whose premises were still held by tenants on contractual and not statutory tenancies. The whole legislation on this subject, and there have been some ten Acts dealing with these questions, though it has only been necessary to refer specifically to three, bears marks of having been passed in some haste and in view of successive emergencies that arose during and after the war through the lamentable shortage of housing accommodation. It is patchwork legislation, has not been framed with any scientific accuracy of language, and presents great difficulties of interpretation to the Courts that have to give practical effect to it. But these considerations, in my judgment, tend in favour of the appellant rather than the respondent in this case. It is the respondent who has to rely on legal niceties, such as fine-drawn distinctions between the comparatively minute class of tenants whose tenancies still remain contractual and the vast class of those who are known as statutory tenants. Apart from such fine distinctions, the appellant can point to the clear recognition by s. 4, sub-s. 1 (*h*), of the Act of 1923, of the right of statutory tenants to sublet part of their premises without incurring forfeiture; and can also point to the words of s. 4, sub-s. 5, of the Act of 1923, which prevent the recovery of possession against a tenant being operative against a sub-tenant. It is no doubt true that this last sub-section contains the phrase "lawfully sublet." But the argument for the respondent admits that the word "lawfully" at least includes a condition that there shall have been no express contractual prohibition against the sub-letting of part of the premises; and there seems to be no sufficient reason for construing the word "lawfully" as implying any further condition which would limit the section to contractual tenancies not subject to this prohibition and exclude statutory tenancies not subject to a like prohibition.

I agree therefore that the appeal should be allowed with costs.

EVE J. This appeal raises the important question whether the holder of a statutory tenancy under s. 15, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in whose contract of tenancy no prohibition against subletting was contained, has power to sublet part of the controlled premises, and thereby confer on any subtenant to whom such part was sublet before any proceedings for possession or ejectment were commenced against the statutory tenant, the protective provisions of s. 5, sub-s. 5, and s. 15, sub-s. 3. In other words, has the part of the premises so sublet been "lawfully" sublet within the meaning of the Act as amended by the Act of 1923?

It has already been decided in this Court that a statutory tenant cannot assign his interest: *Keeves* v. *Dean* (1), but in the same case the question of his right to sublet was expressly reserved. The decision involved a difference of opinion between the members of the Court upon one important point of construction, as to whether the right to assign was or was not a "term or condition" of the original contract of tenancy within the meaning of s. 15, sub-s. 1, of the Act of 1920. The majority of the Court held the right to be incident to the tenant's estate, and not properly, or indeed accurately, described as a term or condition of the tenancy agreement; and this interpretation, which I accept as binding upon us, has been applied in the present and at least one other case by the Divisional Court to negative any right of the statutory tenant to sublet. But it is to be observed that the decision in *Keeves* v. *Dean* (1) did not rest upon this point alone. The Court examined the other relevant sections of the Act, and in particular s. 15, sub-s. 2, and came to the conclusion that the statute was not intended to confer upon the statutory tenant a right to transfer his legal position

(1) [1924] 1 K. B. 685.

under the Act to another person by assignment, and this conclusion is fortified by s. 4, sub-s. 1 (*h*), of the Act of 1923, which excepts from the benefit of the restrictions on the right to recover possession any tenant who without the consent of the landlord has, at any time after the coming into force of the Act of 1923, assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet.

On behalf of the sub-tenant it has been argued that the very terms of that sub-section clearly show that the Legislature is drawing a distinction between an assignment and a subletting of the whole on the one hand, and a subletting of a part on the other, and we have been taken through the Acts, section by section, and invited to determine that not only is there nothing in the Acts to negative the right to sublet a part, but many indications that such sublettings are contemplated.

By the definition section, s. 12, sub-s. 1 (*f*) and (*g*), except where the context otherwise requires, the expression "tenant" includes any person from time to time deriving title under the original tenant, the expressions "tenant and tenancy" include "sub-tenant and sub-tenancy," and the expression "let" includes "sublet."

In examining the context in which these various expressions are to be found we are certainly entitled, if not bound, to take into account the circumstances in which the Acts came to be passed, the nature of the tenements to which they apply, and the primary object of the whole legislation. The abnormal shortage of available dwellings for persons compelled by their means and avocations to reside in dwellings of very moderate rental value, and the apprehension that an excessive demand for accommodation of this class would inevitably raise rents to an insufferable extent, were no doubt the main factors in promoting the passing of the Acts, and from the very first, and still more forcibly as the competition for habitations increased, it must have been appreciated that premises of the nature intended to be protected by the Acts were rarely occupied by one family alone, but were frequently sublet in floors, and even single rooms, to several. Indeed, unless such had been the case, it is difficult to believe that the Acts would have accomplished what they have done. Moreover it must not be lost sight of that no one can fail to have foreseen that the tenants holding under contracts would by degrees become statutory tenants in part by the determination or expiry of their tenancy agreements, and in part also by the service of notices of intention to increase rents.

Bearing these matters in mind, I agree with the other members of the Court that an examination of the Acts, and in particular of those provisions to which counsel for the appellant directed our attention—in the Act of 1920, s. 5 (as amended by the Act of 1923), sub-s. 1 (*b*) and (*h*), and sub-s. 5; s. 8; and s. 15, sub-s. 3; and in the Act of 1923, s. 7—leads to the conclusion that the right of subletting is not restricted to subletting during the currency of the tenancy agreement, but is contemplated and intended to be exercisable by the statutory tenant.

Reliance was naturally placed by the respondent on the expression "lawfully sublet," which occurs in both Acts, but the presence of the qualifying word is, I think, explained by this, that there are at least two forms of subletting which are not lawful under the Acts; one, a subletting which sublets the whole of the dwelling-house, or sublets a part the remainder being already sublet, and the other a subletting made after the commencement of proceedings for recovery of possession, or ejectment.

I agree in thinking that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *H. B. I. Schultess-Young.*
Solicitors for respondent: *Abbott & Hudson.*

NOTE.

Increase of Rent, &c. (Amendment), Act, 1919 (9 & 10 Geo. 5, c. 90), s. 1 —(1.) After the passing of this Act no order or judgment for the recovery

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of possession of a dwelling-house to which the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (hereinafter called the principal Act), or any of the Acts amending the same applies, or for the ejectment of a tenant therefrom, shall be made or given, so long as the tenant continues to pay rent at the agreed rate as modified by the principal Act or any of the Acts amending the same and performs the other conditions of the tenancy, unless . . . . (*b*) the tenant, by subletting the dwelling-house or any part thereof, or by taking in lodgers, is making a profit which, having regard to the rent paid by the tenant, is unreasonable, and the Court considers it reasonable to make such an order or give such judgment. . . . .

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8—(1.) A person shall not, as a condition of the grant, renewal, or continuance of a tenancy or sub-tenancy of any dwelling-house to which this Act applies, require the payment of any fine, premium, or any like sum . . . . in addition to the rent. . . . .

Sect. 15—(1.) A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act, and shall be entitled to give up possession of the dwelling-house only on giving such notice as would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than three months' notice. . . . .

(3.) Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sublet shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.

Rent and Mortgage Interest Restrictions Act, 1923, s. 2—(1.) Where the landlord of a dwelling-house to which the principal Act [Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house: Provided that, where part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, the principal Act shall not cease to apply to the part so sublet by reason of the tenant being in or coming into possession of that part, and, if the landlord is in, or comes into possession of, any part not so sublet, the principal Act shall cease to apply to that part, notwithstanding that a sub-tenant continues in, or retains, possession of any other part by virtue of the principal Act. . . . .

(2.) Where, at any time after the passing of this Act, the landlord of a dwelling-house to which the principal Act applies grants to the tenant a valid lease of the dwelling-house for a term ending at some date after June 24, 1926, being a term of not less than two years, or enters into a valid agreement with the tenant for a tenancy for such a term, the principal Act shall, as from the commencement of the term, cease to apply to the dwelling-house, and nothing in the principal Act shall be taken as preventing or invalidating the payment of any agreed sum as part of the consideration for such lease or agreement: Provided that, where part of the dwelling-house is lawfully sublet at the commencement of the term, and is a dwelling-house to which the principal Act applies, that part shall, notwithstanding anything in the foregoing provisions of this sub-section, continue to be a dwelling-house to which the principal Act applies.

Rent and Mortgage Interest Restrictions Act, 1923, s. 4. The following section shall be substituted for s. 5 of the principal Act [Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17)]—namely:—

"5.—(1.) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . . .

(*b*) The tenant or any person residing or lodging with him or being his sub-tenant has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers . . . . and, where such person is a lodger or sub-tenant, the Court is satisfied that the tenant has not, before the making or giving of the order or judgment, taken such steps as he ought reasonably to have taken for the removal of the lodger or sub-tenant. . . . .

(*h*) The tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sublet the whole of the dwelling-house or sublet part of the dwelling-house, the remainder being already sublet. . . . .

(5.) An order or judgment against a tenant for the recovery of possession of any dwelling-house or ejectment therefrom under this section shall not affect the right of any sub-tenant to whom the premises or any part thereof have been lawfully sublet before proceedings for recovery of possession or ejectment were commenced, to retain possession under this section, or be in any way operative against any such sub-tenants. . . . .

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 3—(1.) Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to obtain possession. . . . .

Rent and Mortgage Interest Restrictions Act, 1923, s. 7—(1.) Where part of a dwelling-house to which the principal Act applies is lawfully sublet, and the part so sublet is also a dwelling-house to which the principal Act applies, then, in addition to any increases permitted by paragraphs (*a*) to (*e*) of sub-s. 1 of s. 2, of the principal Act, an amount not exceeding 10 per cent. of the net rent of the dwelling-house comprised in the sub-tenancy shall be deemed to be a permitted increase in the case of that dwelling-house, and an amount equivalent to 5 per cent. of the net rent of the dwelling-house comprised in the sub-tenancy shall be deemed to be a permitted increase in the case of the dwelling-house comprised in the tenancy. . . . .

(2.) Where part of any such dwelling-house is so sublet, the tenant shall, on being so requested in writing by the landlord, supply him, within fourteen

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days thereafter, with a statement in writing of any subletting, giving particulars of occupancy, including the rent charged, and should the tenant without reasonable excuse fail to do so or supply a statement which is false in any material particulars he shall be liable on summary conviction to a fine not exceeding 2*l.*

(3.) In sub-s. 6 of s. 2 of the principal Act the expression "landlord" shall, in relation to a sub-tenancy, be taken to include not only the person who is immediate landlord of the sub-tenant but also the landlord of that person.

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[IN THE COURT OF APPEAL.]

ELLERMAN LINES, LIMITED *v.* READ AND OTHERS.

[1925. E. 1204.]

Foreign Judgment—British Subject obtaining foreign Judgment by Breach of Contract and Fraud—Jurisdiction of English Court to restrain Enforcement of Judgment—Arrest of Ship—Damages.

The fact that a British subject has actually obtained judgment in a foreign Court does not prevent an English Court from granting an injunction restraining its enforcement where it is shown to have been obtained by a breach of contract or by fraud. In granting an injunction in those circumstances the English Court does not seek to assert jurisdiction over the foreign Court; it proceeds upon the principle that the person seeking to enforce the judgment is in conscience debarred from attempting to do so.

Observations by Atkin L.J. and Eve J. as to the drawing up of orders.

Decision of MacKinnon J. varied.

APPEAL from a decision of MacKinnon J.

The plaintiffs were the owners of the steamship *Falernian* which in November, 1924, went ashore on the coast of Roumania. A salvage steamer, the *Semper Paratus*, belonging to the defendants and commanded by one of them named Landi, who was a naturalized British subject, came alongside, and, as a result of an interview between the captain of the *Falernian* and Landi, an agreement was signed for the salvage of the vessel and cargo. By that agreement, which was in the standard form approved and published by the Committee of Lloyd's, Landi, therein called "the contractor," agreed to use his best endeavours to salve the vessel and cargo and take them to the nearest safety place, upon the principle of "no cure—no pay," the contractor's remuneration in the event of success to be ——*l.*, unless that sum should afterwards be objected to, in which case the remuneration was to be fixed by arbitration in London. The contractor, immediately after the termination of the services, was to notify the secretary of Lloyd's of the amount for which he required security to be given, and, failing notification by him within forty-eight hours after the termination of the service, he was to be deemed to require security to be given for such sum as the Committee of Lloyd's should consider sufficient. Clause 5 was in these terms: "The contractor engages not to arrest or detain the property salved except in the event of any attempt to remove the same from ——— without his consent before security as aforesaid has been given to the Committee of Lloyd's in such manner and form as the Committee of Lloyd's in their absolute discretion may consider sufficient. . . . . Pending the completion of security the contractor shall have a lien on the property salved for his remuneration."

That agreement was signed on November 24, 1924, and the *Semper Paratus* proceeded with the salvage operations, with the result that on March 7, 1925, the *Falernian* was floated and taken to Constanza. It was then arranged that she should be taken to Constantinople, and on May 14 it was agreed by Landi and the master of the *Falernian* that the dry dock in Constantinople should be substituted as the port of delivery instead of the "nearest safety place" in the original agreement. After some repairs were effected at Constanza, the *Falernian* proceeded to Constantinople, where she arrived on May 29, 1925. From that date she remained there in dry dock undergoing repairs with a view to being towed to England or Holland for more extensive repairs. The plaintiffs sent out a tug to Constantinople to tow her away. On July 6 she was ready to sail, and would have sailed in tow of the tug but for certain incidents which then happened. Arrangements were being made in London by the solicitors then acting for Landi in reference to security being obtained for the salvage remuneration, and arrangements were duly made by them for an open guarantee by the Ellerman Lines, Ld., being deposited with Lloyd's. This fact was communicated to Landi's son, who was then in London, and also to Landi himself, who wrote that he agreed to this course being followed. Accordingly the open guarantee was duly obtained by Landi's solicitors and deposited at Lloyd's. Notwithstanding this, in breach of his undertaking in clause 5 of the salvage agreement, and notwithstanding a warning by his solicitors of the illegality of his action, Landi caused the *Falernian* to be arrested under a process of the Turkish Court at Constantinople in a salvage suit instituted by him. The master of the *Falernian* appeared in Court and asked for her release on the ground of the salvage agreement and the open guarantee which had been lodged with Lloyd's. Landi then took up the attitude that he had not authorized his London solicitors to accept the security offered, and thereupon the Court made an order on August 23 that the master must prove that Landi had authorized his solicitors in London to accept the guarantee that was given " and if he so desires [the master] can put the contractor to the oath." On October 25 the oath was administered to Landi, who swore that he had not given authority to his London solicitors to take a guarantee or security concerning the salvage of the *Falernian.* The master thereupon withdrew from the proceedings, and on November 3 the case was heard in his absence and judgment given in favour of Landi for an amount equivalent to a sum in English currency of 23,890*l.* The value of the ship at Constantinople was 3000*l.* or 4000*l.*, and Landi had already been paid 4000*l.* on account of the salvage.

The writ in the present action was issued on September 9, 1925, claiming damages for breach of the salvage agreement of November 24, 1924. On February 23, 1926, on the application of the plaintiffs, Rowlatt J. granted an injunction restraining the defendants their agents and servants from taking steps to enforce the Turkish judgment until the hearing of a summons returnable on February 26. On March 8 Roche J. continued the injunction restraining the defendants from proceeding further by assignment or by themselves to enforce the Turkish judgment and from taking any further proceedings other than the arbitration in respect of the steamship *Falernian* or any other vessel of the plaintiffs in connection with the salvage of the steamship *Falernian* until further order. On April 19 Greer J. ordered that the injunction granted by Roche J. should be continued until the trial of the action. In December, 1926, the defendant Landi confessed judgment in the Turkish Court to his brother for a sum of 6735*l.*, and notice was served upon the master of the *Falernian* that she would be sold unless Landi's brother's claim for this sum was paid. This sum was not paid, and in April, 1927, the *Falernian* was put up for auction by the Turkish Court, and Landi's brother took her in satisfaction of his judgment debt.

In May, 1926, the statement of claim in this action was delivered; it claimed (inter alia) (1.) a declaration that the Turkish judgment was void as against the plaintiffs and the *Falernian* and any other ships or property of the plaintiffs and as against the master of the *Falernian* and his property; (2.) damages; (3.) an injunction restraining the defendants and/or their servants and agents from taking any steps to enforce (by themselves or by assignment) the Turkish judgment either against the steamship *Falernian* or against any other ships or other property of the plaintiffs or against the master of the steamship *Falernian* or his property.

At the trial MacKinnon J. found that Landi committed a deliberate and shameless breach of contract when he caused the *Falernian* to be arrested, and that when he swore that he had not authorized his London solicitors to take a guarantee he told a lie, and the judge held that the plaintiffs were entitled to recover as damages (1.) the cost of the tug sent by them to Constantinople to tow the *Falernian*; (2.) the legal expenses incurred in attempting to obtain the release of the *Falernian*; (3.) the wages and expenses of the master and crew of that vessel from July 1, 1925, till November 3, 1925. He held, however, with regard to the claim for the value of the ship or for the loss of her use at

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25*l.* per day, that if the plaintiffs had not withdrawn from the Turkish action but had continued to defend it and had informed the Turkish Court that the whole of the salved property was worth only 3000*l.* or 4000*l.* and that 4000*l.* had already been paid in respect of salvage services the Turkish Court would not have awarded 23,890*l.* as salvage; and it did not seem to him that it was a necessary consequence of the defendants' breach of contract in arresting the ship that she was eventually lost to the plaintiffs, who, therefore, he held, were not entitled to claim her value. He made a declaration that the Turkish judgment having been obtained in breach of the salvage agreement and procured by the fraud of Landi was not enforceable in England by the defendants against the plaintiffs, or the master of the *Falernian*, or against any of the plaintiffs' ships or property; but he considered that he had no power to grant an injunction restraining the defendants from seeking to enforce the Turkish judgment in Turkey or elsewhere out of England; he continued, however, till the hearing of the present appeal, the injunction granted by Rowlatt, Roche and Greer JJ. He dismissed a counterclaim by the defendants for 23,890*l.* in respect of the salvage services.

The plaintiffs appealed from so much of the judgment of MacKinnon J. as refused their claim for an injunction and their claim for damages in respect of the wages and expenses of the master and crew after November 3, 1925, and in respect of the value of the ship.

Raeburn K.C. and *David Davies* for the appellants. The judge's refusal to grant an injunction was based upon his view that to grant an injunction would be an interference with the jurisdiction of the Turkish Court. In such a case the English Court acts in personam and will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction: *Carron Iron Co.* v. *Maclaren* (1), cited by Farwell L.J. in *Pena Copper Mines* v.

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(1) (1855) 5 H. L. C. 416, 439.

Rio Tinto Co. (1), where the Court restrained proceedings in Spain by a party to an agreement referring differences and disputes to arbitration and providing that the award of arbitrators or an umpire should be a condition precedent to any liability. *Lett* v. *Lett* (2) is to the same effect. That the Court can restrain a British subject from resorting to a foreign Court either upon an alleged cause of action which is forbidden in this country, or in breach of a contract made in this country, is clear from the decisions in *Bushby* v. *Munday* (3); *Lord Portarlington* v. *Soulby* (4); and *In re Conolly Brothers.* (5) In the last cited case Buckley L.J. pointed out that proceedings by a person elsewhere may be restrained upon any one of at least three grounds: first, by reason of contract; secondly, by reason of conduct; and, thirdly, by reason of the fact that the proceedings are vexatious or oppressive. Those grounds are applicable in the present case. The fact that the proceedings in Turkey have resulted in a judgment is no bar to the power of the English Court to restrain a defendant from seeking to enforce that judgment which has been obtained by a breach of contract and supported by fraud.

[They also cited *Abouloff* v. *Oppenheimer & Co.* (6) and *Cohen* v. *Rothfield.* (7)]

The appellants are clearly entitled to greater damages in respect of the wages and expenses of the master and crew than have been allowed by MacKinnon J. The appellants should be allowed the amount not merely till the date of the judgment in Turkey, but for a reasonable time to allow the master and crew to be brought home. Further, the loss of the *Falernian* was directly due to her arrest in breach of contract and by the fraud of Landi; the appellants are therefore entitled to her value as at the date when they were deprived of her by the arrest.

Wilfrid Lewis and *G. K. Rose* for the respondents. We do not dispute that an English Court has power to restrain

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(1) (1911) 105 L. T. 846, 852.
(2) [1906] 1 I. R. 618, 635, 645.
(3) (1821) 5 Madd. 297.
(4) (1834) 3 Myl. & K. 104.
(5) [1911] 1 Ch. 731, 747.
(6) (1882) 10 Q. B. D. 295.
(7) [1919] 1 K. B. 410.

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a person from bringing an action or continuing proceedings in a foreign country where it is shown to be vexatious or oppressive for him to do so. This jurisdiction was exercised in *Pena Copper Mines* v. *Rio Tinto Co.* (1) But there is no authority for the proposition that this Court can restrain a person from enforcing a judgment which he has actually obtained in a foreign country. So long as the foreign Court has not acted in the sense that it has not given judgment, an action here to restrain a person from proceeding with his suit in the foreign Court involves no interference with that tribunal; but the moment judgment has been given, an injunction granted by this Court would amount to an interference with the jurisdiction of the foreign Court, because it would amount to telling it that its judgment was not worth the paper that it was written on. There is, it is true, a dictum of Leach V.-C. in *Bushby* v. *Munday* (2) which may be said to point in favour of the view that an injunction may be granted even if judgment has been obtained in the foreign Court, but that expression of opinion was unnecessary for the decision inasmuch as judgment had not been obtained in that case in the foreign Court. That dictum is the only reference to be found in the authorities which lends any support to the appellants' contention.

With regard to damages: the judge was right in holding that the loss of the vessel was not the direct consequence of Landi's breach of contract; it was lost because the master withdrew from the proceedings and allowed judgment to go by default. The judge was also right in limiting the damages in respect of the wages and expenses of the master and crew to the period to November 3, 1925.

SCRUTTON L.J. [after stating the facts continued:] The learned judge, as was to be expected, took a very serious view of Landi's conduct. He granted an injunction restraining the respondents from enforcing the Turkish judgment in England, but held that he had no power to restrain them from enforcing it outside the jurisdiction of the English

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(1) 105 L. T. 846.

(2) 5 Madd. 297, 308.

Courts. For that reason he did not grant such a wide injunction as had been given before the trial, but by some slip, he continued the injunction in its wider form until the hearing of the appeal. If he had no jurisdiction to grant it, he had obviously no jurisdiction to continue it. I am, however, unable to share the learned judge's doubts as to his power to grant the injunction in its wider form. Here we have an English contract, considerable portions of which were to be performed in England, entered into by a naturalized British subject; that naturalized British subject is proved to have broken that contract and by fraud obtained a foreign judgment which he proposes to enforce against the property of the other contracting party. He has been properly served with the writ in this action and is a party to the proceedings. In such a case, as I understand the decisions, the English Courts have always professed, and asserted, their power to act. They do not, of course, grant an injunction restraining the foreign Court from acting; they have no power to do that; but they can grant an injunction restraining a British subject who is fraudulently breaking his contract, and who is a party to proceedings before them, from making an application to a foreign Court for the purpose of reaping the fruits of his fraudulent breach of contract. This appears from a series of authorities. Perhaps the point was put most neatly by Lord Brougham in *Lord Portarlington* v. *Soulby* (1): "In *Lowe* v. *Baker* (2) it appears that one only of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction here, and the Court allowed the subpœna to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain those proceedings at Leghorn, after advising with the other judges; but the report adds, 'sed quaere, for all the Bar was of another opinion'; and it is said that, when the argument against issuing it was used, that this Court had no authority to bind a foreign Court, the answer was given, that the injunction was not directed

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(1) 3 Myl. & K. 104, 107.

(2) (1692) 2 Freem. 125.

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to the foreign Court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a Court within this country, which no order of this Court ever affects to bind, our orders being only pointed at the parties to restrain them from proceeding." Exactly the same thing was said, in slightly different words, in *Carron Iron Co.* v. *Maclaren* (1) as to the jurisdiction of the English and Scottish Courts. There Lord Cranworth said (2): "But even when there is no question as to the foreign litigation being or not being necessary, or being or not being likely to be so effectual as litigation in this country, still if a person within the jurisdiction of the Court of Chancery is instituting proceedings in a foreign Court, the instituting of which is contrary to equity and good conscience, the Court will, on a bill filed here, restrain the prosecution of such foreign suit, just as if it had been a suit in this country. This was the case of *Lord Portarlington* v. *Soulby* (3), where Lord Brougham, after fully considering the principles on which a Court of equity acts in these cases, restrained the defendant, the indorsee of a bill of exchange, from suing the plaintiff in the Irish Courts on that bill, upon certain equitable grounds, which would have warranted a similar injunction against any action in the Courts of this country." The English Courts have therefore clearly jurisdiction to restrain a person who is subject to the English jurisdiction from taking proceedings in a foreign Court in breach of contract and in fraud. But Mr. Wilfrid Lewis took the point that while an injunction can be granted to restrain the institution or continuation of proceedings in a foreign Court there is no power, after the foreign Court has given judgment, to grant an injunction restraining the person who has obtained it from reaping its fruits. If there is no authority for this it is time that we made one, for I cannot conceive that if an English Court finds a British subject taking proceedings in breach of his contract in a foreign Court, supporting those

(1) 5 H. L. C. 416.

(2) 5 H. L. C. 439.

(3) 3 Myl. & K. 104.

proceedings, and obtaining a judgment, by fraudulent lies, it is powerless to interfere to restrain him from seeking to enforce that judgment. I am quite clear that such an injunction can be and in this case ought to be granted in the terms asked for in the statement of claim.

The remaining questions relate to damages. The appellants asked for the hire of the tug they sent out to tow the *Falernian* from Constantinople, and also the legal expenses incurred by them in trying to obtain the release of the vessel. The judge allowed both those heads of damage and no appeal is brought in respect of them. The two questions raised on the appeal are in connection with the wages and expenses of the master and crew of the *Falernian* from the date of the arrest of the ship. MacKinnon J. said that they were entitled to reasonable expenses, and he gave the expenses of detaining the master and crew to the date when judgment was pronounced—namely, on November 3, 1925. The ship had not yet been parted with or sold, and there were considerable doubts as to what might happen; and I am not able to say that as soon as the Turkish judgment was given the master and crew ought to have come away. If they were to leave on November 3, they had to be brought home. We propose therefore to alter that fixed date of November 3 and say that the appellants are entitled to the wages and expenses of the master and crew for a reasonable time having regard to all the circumstances, and that the amount will have to be assessed.

The remaining question of damages is this: the appellants claimed either the value of the *Falernian*, or alternatively the loss of the use of the vessel from November 15, 1925, at 25*l.* per day. Are the appellants entitled to say that Landi's breach of contract, and the fraud by which he obtained the judgment, have caused the loss of the *Falernian*? What Landi in effect says is: "Assume that I was fraudulent and assume that I was breaking my contract, still if you had acted with sufficient vigour you would have defeated my fraud and so you cannot be heard to say that the loss of the vessel is the result of my fraud." I have no sympathy with that line of argument. In my view the appellants are entitled to have the value of the ship. Following the analogy of the cases on capture, the date should be the date when the appellants were first deprived of their property in the ship by the arrest. The tribunal which will have to assess the damages must find the value on that date, which will include whatever value had been added by the money that the appellants have spent on the ship to get her to the point where she was arrested.

The appeal will be allowed, an injunction will be granted in the terms of the statement of claim, and the damages both in respect of the wages and expenses of the master and crew, and of the value of the ship at the time of her arrest, will have to be assessed.

Atkin L.J. I agree. In this case MacKinnon J. gave judgment for the appellants and granted certain relief. The appellants appeal and contend that they are entitled to further relief.

There is an undisputed finding of fact by the judge that the defendant Landi committed a breach of contract by arresting the *Falernian* and that all the defendants who were partners are liable for the consequences of that breach of contract. There is a further finding by the judge that Landi procured a judgment of the Turkish Courts by a fraudulent misrepresentation. [His Lordship dealt with the proceedings in the Turkish Courts and continued :] The appellants now say that as the judgment was obtained in Constantinople by reason of a breach of contract and by a fraud they are entitled to a declaration that that judgment cannot be treated as valid, and to an injunction to restrain the person who obtained it from enforcing it. MacKinnon J. made the declaration asked for, and the question is whether they are entitled to an injunction. For the defendants it is said that the Court has no power to grant such an injunction. True it is, they say, the Courts here have from time to time granted injunctions against persons commencing or continuing proceedings in foreign Courts, but that power ceases the moment judgment has been obtained. The judgment once obtained, it is said, is sacrosanct, and the party cannot be restrained from enforcing it. That seems to me a remarkable contention. During the argument I put the case of an Englishman obtaining a foreign judgment against a third person, assigning it for value to another Englishman, and for further assurance covenanting not to enforce it abroad except for the benefit, and with the consent, of the assignee, and thereafter, in violation of his contract, seeking to enforce the foreign judgment. It appears to be contended that an English Court could not restrain him. Or, assume that an agent obtained a judgment abroad on behalf of his principal and then sought to enforce it for his own benefit and contrary to the instructions of the principal. Again it is said that the agent could not be restrained from acting in breach of his fiduciary obligation to his principal. In my view the English Courts are not so bankrupt of resources as to be incapable of granting a remedy in cases such as those. There is no ground upon which the remedies granted by the English Courts should be so restricted. The principle upon which an English Court acts in granting injunctions is not that it seeks to assume jurisdiction over the foreign Court, or that it arrogates to itself some superiority which entitles it to dictate to the foreign Court, or that it seeks to criticize the foreign Court or its procedure; the English Court has regard to the personal attitude of the person who has obtained the foreign judgment. If the English Court finds that a person subject to its jurisdiction has committed a breach of covenant, or has acted in breach of some fiduciary duty or has in any way violated the principles of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgment obtained in breach of such obligations, it will restrain him, not by issuing an edict to the foreign Court, but by saying that he is in conscience bound not to enforce that judgment. It was every-day procedure at one time for the Court of Chancery to restrain a person from proceeding upon a judgment obtained in a common law Court where it was necessary to do so. Therefore I think that the criticism addressed to the claim for an injunction in this case—a criticism which was accepted by MacKinnon J.—is unfounded.

In the interests of justice in this case it is essential that an injunction should be granted restraining the defendants from reaping any advantage from the judgment obtained in Turkey, first in breach of an express contract and secondly by a gross fraud.

With regard to the damages, it is unfortunate that the learned judge should have fixed the date up to which the wages of the master and crew were to be paid as the date of the Turkish judgment. The circumstance that they had to be brought home afterwards, and their wages would still be running, is cogent to indicate that that date in itself cannot be the correct date. It is obviously a question for consideration what was a reasonable time in the circumstances up to which they should be paid. The other point as to damages relates to the value of the ship. The learned judge has held that the appellants have not lost their ship by reason of the Turkish proceedings but by reason of their not having taken any further part in the proceedings than they did. In other words, he has held that they ought to have mitigated their damages, and that if they had continued to appear before the foreign Court, non constat but that the foreign Court would have made an award equivalent to one which might have been made by a British Court, and that if such an award had been made against them, they would have taken it up and would have been exposed to no further liability and would not have lost their ship. That does not give effect to the paramount consideration in this case, which was that the proceedings themselves were in direct breach of contract and that Landi was pursuing them in fraud. The appellants say that it was not reasonable to expect them to have gone on with the proceedings in Turkey. They say that if they had gone on they might have diminished the large award of 23,890*l.*, but if they had gone on they would have submitted to the jurisdiction and would have taken the risk of such an award as the Turkish Court might choose to make ; such a risk they say it was unreasonable for them to run, as the whole proceedings began by a direct breach of the contract. In my opinion the learned judge ought to have held that it was not reasonable to expect the appellants in this action to have continued the proceedings in Turkey. That being so, it appears to me that the loss of the vessel followed directly from the initial breach of contract—the arrest of the ship—followed up, as it was, by the fraud of the defendant Landi. The appellants are entitled to recover damages based on the value of the ship at the date when the breach of contract was committed, which resulted in the loss—namely, at the date of the arrest.

I desire to add that it is unfortunate that there has been a series of irregularities in this case in connection with the claim for an injunction. The injunction that was eventually granted—the interim injunction—was granted before the statement of claim was delivered and was in a wider form than that which was, as I have no doubt deliberately, adopted by the pleader in the statement of claim. I think it would have been extremely doubtful whether the judge ought to have granted any other injunction than that asked for in the statement of claim, without an amendment of the statement of claim which was never asked for. The judge came to the conclusion that he could not grant an injunction, but nevertheless he granted an interim injunction until the hearing of the appeal, which is very difficult to explain. That judgment when drawn up, instead of reciting what the order of the Court was and what the defendants were restrained from doing, only refers to continuing an injunction granted by Rowlatt J., varied by Roche J., and continued by Greer J., without stating what it is that the Court was ordering the defendants to abstain from doing. That appears to me to be very bad practice; and if such a judgment as that were brought to the attention of any foreign critic familiar with the careful way in which judgments are drawn up, it would be likely to expose the English Courts to contempt. It is a matter of very great importance that the orders of the Court should be drawn up in accordance with the established practice and should make it clear what the Court is ordering to be done. There is considerable laxity in this matter, especially in judgments drawn up in the King's Bench

Division. Practitioners and the officers of the Court should see that orders are not passed unless they are in proper form. I agree that the appeal must be allowed and that the judgment as drawn up must contain the precise terms of the injunction which is being granted.

EVE J. I agree, and particularly with the concluding observations of Atkin L.J. as to the form of the various orders which have been made. In the exercise of the judicial discretion as to granting injunctions and in framing orders restraining the liberty of the subject the greatest care should be taken in determining whether an order should be made and in stating with the greatest precision the form which the order is to assume. I agree that if the orders in this case were produced in a foreign tribunal acquainted with the practice of the Chancery Division the foreign Court would regard them as astonishing.

So far as the jurisdiction is concerned, the power of the Court to grant such an injunction as is now claimed has been established by a long line of authorities commencing with *Bushby* v. *Munday* (1) and *Carron Iron Co.* v. *Maclaren* (2) and coming down to quite recent dates. I can see no logical reason to suppose that it ceases to be exercisable as soon as a judgment has been pronounced by the foreign tribunal. No doubt the jurisdiction is to be exercised with caution, but if ever there was a case calling for its exercise, this is the one. The foreign proceedings here were instituted and prosecuted in clear breach of contract, and the judgment was ultimately obtained by a deliberate and flagrant misrepresentation. The appellants in those circumstances are entitled to all the protection which this Court can extend to them.

I agree with what has been said by the other members of the Court as to damages.

Appeal allowed.

Solicitors for appellants: *Parker, Garrett & Co.*

Solicitors for respondents: *Amery Parkes & Co.; Leader, Plunkett & Leader.*

J. S. H.

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(1) 5 Madd. 297. (2) 5 H. L. C. 416.

[IN THE COURT OF APPEAL.]

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Feb. 21, 22, 23.

DEE CONSERVANCY BOARD AND OTHERS *v.* McCONNELL AND ANOTHER.

River—Ketch sunk by Negligence of its Owners—Wreck obstructing Navigation—Liability of Ketch Owners at Common Law—Damages—Cost of removing Obstruction.

A ketch belonging to the defendants sank, owing to their negligence, in the River Dee, of which the first plaintiffs were the conservators, and thereby obstructed the navigation of the river and the second plaintiffs' wharf and the approaches thereto. Immediately after the sinking of the ketch, and before any expenses were incurred in removing her, the defendants abandoned her. The plaintiffs jointly incurred expenses in removing the obstruction, and sued to recover the amount from the defendants :—

***Held*, that the ketch having sunk through the negligence of the defendants, they became liable at common law for the damage caused by the obstruction to the navigation of the river and the blocking of the approach to the second plaintiffs' wharf and that they could not escape liability for that damage by abandoning the wreck :—**

***Held*, further, that the damages recoverable were the reasonable cost of removing the obstruction.**

***The Ella* [1915] P. 111, so far as the decision was based on liability for negligence, followed.**

Dictum in *The Utopia* [1893] A. C. 492 questioned.

***Barraclough* v. *Brown* [1897] A. C. 615 considered.**

APPEAL from the Liverpool Court of Passage.

The plaintiffs, who were the Dee Conservancy Board, and John Summers and Sons, Ld., sued the defendants, who were the owners of the wooden ketch *William Shepherd*, to recover the expenses incurred by the plaintiffs in the removal of the ketch, which sank in the River Dee in July, 1926, alongside the second plaintiffs' wharf, thereby, as the plaintiffs alleged, obstructing the navigation of the river and the second plaintiffs' wharf and the approaches thereto. The action was founded on the common law rights of the plaintiffs. There was an alternative claim for damages for nuisance.

The plaintiff Board was constituted by the Dee Conservancy Act, 1889 (52 & 53 Vict. c. clvi.), which incorporates (inter alia) s. 56 of the Harbours, Docks, and Piers Clauses Act, 1847 (1), which deals with the removal of wreck or other obstruction to a harbour, dock or pier, and the recovery of the expense of so doing. By their private Act the plaintiff Board were the conservators of the river Dee within certain limits, with power to make, maintain and use wharves and jetties, to grant licences to do the like, and to levy tolls. The second plaintiffs were the licensees of the wharf close to which the defendants' ketch sank.

Immediately after the sinking of the ketch, and before expenses were incurred by the plaintiffs in removing her, the defendants gave notice of abandonment to their underwriters, who, while refusing to accept the notice, agreed to place the defendants in the same position as if a writ had been served upon the underwriters on the date of the notice of abandonment.

As the ketch where she lay was an obstruction, the plaintiffs caused her to be removed, and this was done at a cost of 1569*l.* 18*s.* 9*d.*, part of which was paid by the plaintiff Board and part by the second plaintiffs, and it was to recover this sum that the action was brought.

At the trial the judge found that the ketch sank owing to the negligence of the defendants; that as no physical damage was done to the second plaintiffs' wharf, and they had proved no loss, they were not entitled to recover damages; but, applying *The Ella* (2), that the Board were entitled at common law to recover the cost they had incurred in removing the obstruction, and he gave judgment for them accordingly.

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(1) Harbours, Docks, and Piers Clauses Act, 1847, s. 56: "The harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction or floating timber shall be repaid by the owner of the same, and the harbour master may detain such wreck or floating timber for securing the expenses, and on non-payment of such expenses, on demand, may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand."

(2) [1915] P. 111.

The defendants appealed, and there was a cross-appeal by the second plaintiffs.

Trapnell (*Dunlop K.C.* with him) for the appellants. Where a vessel has been sunk in a harbour or in a navigable river the harbour authority, in relation to such a case, are limited to the rights conferred upon them by their statute. In this instance the Dee Conservancy Board's powers are defined by s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, by which they are entitled to recover the expense of removing the obstruction from the " owner " of the vessel. Here, the appellants having abandoned the vessel before the expenses claimed were incurred were not the " owners " of the vessel at the material time and are therefore not liable for those expenses: *The Crystal* (1); *Barraclough* v. *Brown*. (2) In *The Utopia* (3), Sir Francis Jeune, in delivering the judgment of the Privy Council, said (4): "The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her." The same view was expressed by Brett L.J. in *The Douglas* (5), where he said this (6): "I incline to agree that if the owners of a wreck abandon it their liability ceases." *The Ella* (7), upon which the judge in the Court below based his judgment, is inconsistent with the decisions cited above, as there the defendants owed no duty to the harbour authority not to collide with the barge that sank; their only duty was to the barge, and this gave the harbour authority no cause of action; and the expenses of removal were not damage caused by any breach of duty owed by the owners of the *Ella* to the harbour authority. Nor was there any evidence of special damages which could be recovered on the ground of nuisance. *The Ella* (7) is not binding on this Court, and in any event is distinguishable

(1) [1894] A. C. 508.
(2) [1897] A. C. 615.
(3) [1893] A. C. 492.
(4) [1893] A. C. 498.
(5) (1882) 7 P. D. 151.
(6) Ibid. 160.
(7) [1915] P. 111.

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because in that case the harbour authority was bound to incur the expense of removal, whereas the Dee Conservancy Board could have satisfied their statutory obligation by simply lighting and buoying the wreck. Further, the defendants in *The Ella* (1), not being the owners of the sunken vessel, could not divest themselves of ownership by abandoning the barge as the present appellants could and did. *Louth District Council* v. *West* (2), which was relied upon in *The Ella* (1), has no application to this case, because there the district council was under a statutory obligation to remedy the obstruction in the highway and had statutory power to recover the cost. The Dee Conservancy Board was under no such obligation, and even if it had been, its only statutory power was to recover from the owners of the wreck, and the appellants having abandoned it, were no longer the owners.

As to the claim by Messrs. Summers, that is clearly not maintainable, for there was no damage peculiar to them: see *Winterbottom* v. *Earl of Derby*. (3) There was no evidence that they lost business by the presence of the vessel near their wharf; there was thus no damage established by them.

Eastham K.C. and *R. E. Gething* for the respondents. The judge was right in applying the principle of *The Ella* (1), which is referred to and followed in *The Solway Prince*. (4) Apart altogether from their statutory powers, the Dee Conservancy Board have clearly a common law right of action for damage for negligence, and were therefore entitled to recover the expense of removing the obstruction caused by the wreck. There was an interference by the appellants' vessel with the soil of the river, the navigation of which the Dee Conservancy Board are under an obligation to keep open: see *Mersey Docks & Harbour Board* v. *Gibbs*. (5) With regard to the claim of Messrs. Summers, that is clearly maintainable, inasmuch as the wreck obstructed access to their wharf.

(1) [1915] P. 111.
(2) (1896) 65 L. J. (Q. B.) 535.
(3) (1867) L. R. 2 Ex. 316.
(4) (1914) 31 Times L. R. 56.
(5) (1866) L. R. 1 H. L. 93.

[They referred in detail to the various sections of the Dee Conservancy Act, 1889.]

Trapnell replied.

SCRUTTON L.J. stated the facts as to the sinking of the ketch and continued: Most harbour authorities have statutes which provide for cases not covered by the common law—namely, when damage is done by a ship which has stranded without negligence on the part of the owners; those statutes impose a liability on the owner to pay for the damage caused. In *The Crystal* (1) it was decided that the "owner" meant the person who was the owner at the time the expenses were incurred by the harbour authority, not the owner at the time when the damage or the stranding took place. If at the time the expenses were incurred the original owner of the ship had abandoned her he was held not to be liable. In the present case the appellants, through their solicitors, said that as they had abandoned the ketch before the expenses claimed were incurred, they were not liable, and they relied on *The Crystal*. (1) The respondents, on the other hand, maintained that the appellants were liable for their negligence at common law, and they relied on *The Ella*. (2) The question is which contention is right?

At common law, and before the statutes which have been referred to were passed, the owners were liable for damage caused by their negligence—I say nothing at the moment about nuisance—and could not escape liability by saying they had abandoned the vessel. During the argument I put two cases to Mr. Trapnell. I put the case that I own a dog which I know bites mankind, and it bites a person; I do not escape liability to that person by saying: "I abandon the dog." My liability at common law remains for my negligence in keeping a dog which to my knowledge bites mankind. The second case I put was this: I negligently drive my motor car, which crashes off the highway and on to a private person's lawn and blocks the drive to his house. It will be no answer to the claim by that person for the damage done to his lawn and the blocking of his drive, and for the expense incurred by him in removing the motor car which I had not removed, for me to say: "I abandon the car."

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(1) [1894] A. C. 508.

(2) [1915] P. 111.

The statutes to which I have already referred as giving harbour authorities a right to claim for damage caused to their works without negligence were somewhat ambiguous. *River Wear Commissioners* v. *Adamson* (1) did nothing to remove, but rather increased, that ambiguity, and it is only by the recent decision of the House of Lords in *The Mostyn* (2) that it is made clear that where a ship causing damage to dock works is at the time under the control of the owner's servants, the owner is under a statutory liability for the damage so caused even though his servants have not been guilty of negligence, but that he is not liable where no one was on board when the ship caused the damage. The liability imposed by those statutes is given only on the statutory terms, and given in cases where there has been no negligence; but the old common law liability remains where damage has been done by the negligence of the owner's servants. Lord Herschell makes this clear in *The Crystal* (3), where he says (4): "Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law." Pausing there, Lord Herschell seems to say that if there had been negligence, and the disaster was due to negligence, they would have been liable. But he continues: "they would be under no liability at common law for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of s. 56 [of the Harbour, Docks and Piers Clauses Act, 1847], which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law," and the cases in which liability would exist at common law are cases where the disaster is due to the owners' or their servants' negligence. That view of the liability at common law is that taken by the present respondents, who rely upon *The Ella* (1), where Sir Samuel Evans held that persons who by their negligence sank in the harbour of Southampton another vessel which thereby became an obstruction to the harbour, and which the Harbour Authority therefore removed, were liable at common law for the cost of its removal. If that case is good law it governs this case. In *The Solway Prince* (2) Sir Samuel Evans followed *The Ella* (1), and no appeal was brought, but of course it is open to us to reconsider those decisions.

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(1) (1877) 2 App. Cas. 743.
(2) [1928] A. C. 57.
(3) [1894] A. C. 508.
(4) Id. 516.

The only matter which has caused me any doubt is an expression of Sir Francis Jeune, in giving the judgment of the Privy Council in *The Utopia* (3), an expression which was repeated by Barnes J. in *The Snark*. (4) In *The Utopia* (3) a vessel had sunk in the Straits of Gibraltar without negligence, and the question was whether another vessel, which subsequently ran on to her where she lay, could recover damages. No question was raised whether the owners of the sunken vessel would have been liable if she had sunk through their negligence. Sir Francis Jeune states a general proposition, part of which was not necessary for the decision, because the facts did not raise it; he said (5): "The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her." It will be observed that he did not say that the owner of a vessel sunk by his default is under no liability to those damaged by the sunken vessel; he says that the owner of a ship sunk, whether by his default or not, is under no liability to remove her or to protect other vessels from coming into collision with her. Bear in mind that he was speaking of the Straits of Gibraltar and try to speculate to whom the soil of the Straits belongs.

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(1) [1915] P. 111.
(2) 31 Times L. R. 56.
(3) [1893] A. C. 492.
(4) [1899] P. 74, 80.
(5) [1893] A. C. 498.

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Scrutton L.J.

There have been many cases relating to the liability of the owner of a vessel, after it has sunk, to vessels which have come into collision with her. In *The Douglas* (1), where the vessel was sunk by negligence, the only question argued was whether there was negligence after the vessel had been sunk. The Court of Appeal held that as, immediately she was sunk, the owner notified the harbour master, and was entitled to assume that he would cause her to be lighted, the owner was not liable to light and buoy her or warn other vessels. If in *The Utopia* (2) Sir Francis Jeune meant, in the passage I have quoted, to say that if the owner of a ship has abandoned her, he is under no liability for damage caused by his negligence, I respectfully disagree with his view, being, as it is, against that expressed by Lord Herschell in *The Crystal.* (3) A common law liability for negligence cannot be wiped out by abandoning that which has caused the damage. If Sir Francis Jeune was really thinking of this point—I do not think he was—his remark was obiter. Moreover, we are not technically bound by a decision of the Privy Council. I therefore see no difficulty in the way of the present respondents, one of whom is the owner of the soil with the right to take tolls for navigation and the duty to keep the navigation open, and the other is the owner or licensee of, with an interest in, a wharf, the use of which has been obstructed by the appellants' ketch having grounded alongside and so stopping access to the wharf, recovering damages directly caused by the appellants' negligence.

What are the damages caused by the negligence of a person who deposits an obstruction on the soil of another and so blocks a right of way? I should have thought that if the person who deposits the obstruction declines to remove it, which is the position here, the damages are the reasonable cost of removing it. The second respondents were not bound to allow this obstruction to remain blocking their berth for all time; they were entitled to remove it to minimize the damage, and they incurred the expense which the judge has found to be the reasonable cost of removing it. It seems to me also that the first respondents who, as I have said, have the duty of maintaining a navigable channel, have a common law right to remove the obstruction. The obstruction was deposited in a place which affected both respondents who thereupon jointly made a contract with a salvage association to remove it, the cost of doing this being paid partly by the one respondent and partly by the other. In those circumstances judgment ought to have been entered for both respondents for one sum to be recovered once and not twice. The appeal must be dismissed and the cross-appeal allowed and judgment entered for the respondents jointly for 1569*l*. 8*s*. 9*d*.

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(1) 7 P. D. 151.
(2) [1893] A. C. 492.
(3) [1894] A. C. 508.

SANKEY L.J. I agree. The judge in the Court below has found that the defendants were guilty of negligence. What are the duties of the Dee Conservancy Board and the defendants in those circumstances? The duty of the Board is best laid down in *Mersey Docks and Harbour Board* v. *Gibbs* (1), where Lord Cranworth said (2): "Where such a body is constituted by statute, having the right to levy tolls for its own profits, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and the decision was affirmed in the Court of Error in the case of *Parnaby* v. *Lancaster Canal Co.* (3) The ground on which the Court of Error rested the decision in that case is stated by Tindal C.J. to have been that defendants there, who constituted the company, made the canal for their profit, and opened it to the public upon the payment of tolls. And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property." That being the duty of the Board, what is the duty of the defendants? That was laid down in *White* v. *Crisp* (4), where Alderson B.

(1) L. R. 1 H. L. 93.
(2) Ibid. 122.
(3) (1839) 11 Ad. & E. 223.
(4) (1854) 10 Ex. 312.

said (1): "This subject was discussed by Maule J. in an elaborate judgment, in the case of *Brown* v. *Mallett* (2), and from the principles there laid down by him (which, however, were not all absolutely necessary for the decision of that individual case), we do not disagree at all. He there lays it down thus—that it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others; and he adds that his liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it. For in all these circumstances, the vessel may continue to be in his possession and under his management and control. This duty arises out of the possession and control of the vessel being in him."

Those being the duties respectively of the parties, what are the Board's rights? It is said for the appellants that the rights of the Board are regulated partly by their private Act of 1889, and partly by the incorporation therein of s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, which empowers the Board to remove wrecks or other obstructions; and that in the case of a wreck, s. 56 constitutes a code, and that only in accordance with its provisions can a person suffering damage from the presence of a wreck obtain his remedy. I do not agree that s. 56 constitutes a code to cover all cases. In *The Ella* (3) it was pointed out by Sir Samuel Evans that the words of s. 56 are not exhaustive; he there said (4): "It was contended that the remedies of the plaintiffs were confined to those given by s. 56 of the Harbours, Docks and Piers Clauses Act, 1847. Those remedies are clearly not exhaustive. The clause only deals with the owner of the wreck, and makes him liable, while he remains in law the owner, whether he had been innocent or at fault." Before that section was passed it is quite possible that there might have been two different cases, first, the case of a wreck without fault of the owner, and, secondly, the case of a wreck caused by the owner's default. In the

(1) (1854) 10 Ex. 320.
(2) (1848) 5 C. B. 599.
(3) [1915] P. 111.
(4) Ibid. 120.

first of those cases there was no liability at common law before the Act; in the second, where the owner was in fault, there was in my opinion a liability at common law. The effect of the section is to give a remedy even where the owner has not been in default. *Barraclough* v. *Brown* (1) does not touch the case where the owner is in default, and I think it would be a wrong construction to hold that s. 56, while giving a remedy where none existed before, takes away a remedy previously existing. Express words would be necessary to do that. I am confirmed in that view by the language used by Viscount Haldane in *The Mostyn.* (2) I agree with Mr. Trapnell, who has given us the benefit of a very acute and elaborate argument, that in several cases there are expressions which might appear to favour his contention. It is therefore necessary to examine those cases, but I must add that in considering them we must have regard to the matter under discussion; the words must be taken secundum subjectam materiam. In *The Douglas* (3), in consequence of the default of the master and crew, the vessel sank in the Thames. The mate sent a message to the harbour master informing him of the accident, and the harbour master said he would cause the wreck to be lighted. It was not lighted, with the result that another vessel ran into it, and that gave rise to an action for damages by the damaged vessel against the owner of the *Douglas.* The trial judge refused to admit evidence showing that the mate of the vessel had sent a message to the harbour master and that the latter had promised to light the wreck. It was held by the Court of Appeal that that evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. Brett L.J. said (4): " As to the mate, he gave instructions to the captain of the tug *Endeavour* to inform the harbour master. The latter evidently took it as a piece of information upon which he was to act, for he in effect promised to send lights within an hour. The mate of the

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(1) [1897] A. C. 615.
(2) [1928] A. C. 57.
(3) 7 P. D. 151.
(4) Ibid. 160.

Douglas had a right to assume that the harbour master would do what he promised. Upon the evidence before us there was no negligence and no liability upon the defendants." That was a question of failure to light the wreck.

With regard to *The Utopia* (1), there the owner of the wreck remained in possession, but the port authority undertook the duty of indicating its position so as to secure other ships from suffering damage by collision. It was held that neither the owners nor the wreck were liable for the collision, as the control and management thereof had been legitimately transferred by the owner to the port authority. It was a case therefore proceeding on the question whether the owners had neglected the duty of indicating the position of the wreck, and it was held that the owners had not been negligent. It is true that Sir Francis Jeune, in giving the judgment of the Privy Council, said (2) that "the result of these authorities may be thus expressed. The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her." Those two words "or not" were not necessary for the decision of the case, and, moreover, the judge was not dealing with the problem which confronts us. Those words were referred to and followed by Barnes J. in *The Snark* (3), where he uses the identical words, and adds that the owner in whose possession the vessel was at the time of the sinking, and whether the sinking had occurred by his default or not, could abandon the wreck, and, if he did so, his liability ceased, subject to the question whether he had a duty to give some public notice of the wreck. There Barnes J. held that the defendants were personally liable, as they had a duty to perform—namely, to use reasonable care to warn other persons by indicating tne position of the wreck. That judgment, which was affirmed (4), turned upon similar facts to those in *The Utopia* (1); but, as has already been pointed out, Lord Herschell appeared to take a different view in *The Crystal* (1), where he evidently had in mind a liability at common law when he said (2): "Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of s. 56 [of the Harbours, Docks and Piers Clauses Act, 1847] which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law." These words seem to me to contemplate a case like the present.

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(1) [1893] A. C. 492.
(2) Ibid. 498.
(3) [1899] P. 74, 80.
(4) [1900] P. 105.

With regard to *Barraclough* v. *Brown* (3), I agree that it is somewhat difficult to follow, but in my view it is only an authority as to the tribunal to which a person must resort who seeks to enforce his rights, for it decided that "where a statute gives a right to recover expenses in a Court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a Court of summary jurisdiction: he can only take proceedings in the latter Court." It appears from the facts that the appellant, who was the secretary of the undertakers of the Aire and Calder navigation, and entitled to sue on their behalf, claimed from the respondents the amount expended by the undertakers in removing the respondents' vessel which had sunk in the river within the limits of their jurisdiction, and thereby caused an obstruction. The appellant's claim was preferred on two separate grounds: first, that the respondents, as owners of the ship at the time when she sank were, at common law, responsible to the undertakers for the injury done to the navigation of the river, and for all costs necessarily and reasonably incurred by them in repairing such injury; and, secondly, that s. 47

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(1) [1894] A. C. 508.

(2) [1894] A. C. 516.

(3) [1897] A. C. 615.

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of the Aire and Calder Navigation Act made the persons who were the owners of the vessel at the time when she sank liable to repay such costs to the undertakers. No reference was made in the Court of Appeal to the appellant's common law claim, but it was raised and insisted on at the bar of the House of Lords. Lord Davey said (1): "My Lords, I agree with your Lordships that there is no common law right of action in this case." What I think he meant was that in a case properly coming within the section there in question—s. 47 of the Aire and Calder Navigation Act, 1889—recourse must be had to the named tribunal—namely, the justices. Lord Watson said (2): "My Lords, at present I make this observation upon the plaintiffs' alternative claims, that whilst it appears to me that the first of them might be legitimately pursued before the Queen's Bench Division, I am not satisfied that the second of them could be competently entertained, except by a Court of summary jurisdiction, as is prescribed by s. 47."

The last case to be referred to is *The Ella* (3) which, if rightly decided, is conclusive against the appellants. I need only cite what Sir Samuel Evans said (4): "Negligent navigation of the defendant's vessel was admitted. This, in my opinion, was a breach of duty towards the plaintiffs, which caused them damage, to be measured by the expenses which they had a right to incur, and which, I think too, they were bound to incur." If that is right, it answers the point as to liability and that as to the measure of damages made by Mr. Trapnell. I quite appreciate the principle of the cases cited by Mr. Trapnell—particularly *Winterbottom* v. *Earl of Derby* (5)—but I cannot say that the measure of damages as applied by the judge in the Court below was wrong. It is the duty of the plaintiff in such a case to show that he has minimized his damage. In this case the Dee Conservancy Board's duty was to keep the river free from obstruction. With regard to the second plaintiffs, they were, by the licence granted to them, entitled to occupy their wharf, and that wharf and the approach to it were obstructed by the wreck. Were they to leave the wreck there for ever, or were they to do what they did to minimize the damage in the future—namely, to remove the obstruction? I am of opinion that the judge was right on that point. For the reasons given by my lord judgment ought to be entered in the way he has indicated.

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(1) [1897] A. C. 623.
(2) Ibid. 621.
(3) [1915] P. 111.
(4) Ibid. 121.
(5) L. R. 2 Ex. 316.

RUSSELL J. In my opinion this case is governed by *The Ella* (1), if that case was rightly decided, so far as it turned upon negligence. One of the points decided there was that the owner of the vessel, who by his negligence had sunk a barge which obstructed the navigation, was liable at common law to repay the harbour authorities the expenses incurred by them in removing the obstruction, those expenses being the damages arising from the negligence. The amount was directed to be assessed, but in the present case there is no suggestion that the amount of the expense incurred was unreasonable. As to *The Ella* (1), an appeal was entered but subsequently withdrawn. I can see no reason for saying that *The Ella* (1) was not rightly decided on the ground of negligence; but I prefer to keep an open mind upon the question how far it was correctly decided upon the point of nuisance, because I think there are passages in *Barraclough* v. *Brown* (2) which require careful consideration when that point arises. Here the negligence complained of—namely, the negligence which caused the sinking of the barge, in its results affected both the respondents, and in my opinion the proper course to pursue is to enter judgment for 1569*l*. 18*s*. 9*d*. in favour of both respondents.

Appeal dismissed; cross-appeal allowed.

Solicitors for appellants: *Holman, Fenwick, & Willan.*

Solicitors for Dee Conservancy Board and John Summers & Sons, Ld.: *Alfred Bright & Sons, for Batesons & Co., Liverpool.*

J. S. H.

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(1) [1915] P. 111.

(2) [1897] A. C. 615.

C. A.

1928
March 7, 8,
28.

[IN THE COURT OF APPEAL.]

ENGLISH HOP GROWERS, LIMITED *v.* DERING.

[1926. E. 1519.]

Contract—Association for organizing Marketing of Hops—Agreement by Member to deliver to Association Hops grown on his Land—Lease by Member of Land to Company—Hops pickable at Commencement of Lease—Restraint of Trade—Fixed Sum for Breach of Agreement—Penalty or liquidated Damages

The defendant was a member of the plaintiff society, which was formed to organize the marketing of home-grown hops by their sale through the plaintiffs, and by a written agreement the defendant undertook to deliver to the plaintiffs all hops grown or produced by him in 1926 on certain land consisting of sixty-three acres. The agreement also provided that if the defendant failed to deliver to the plaintiffs the hops grown on those lands or disposed of them otherwise than through the plaintiffs he would pay to the plaintiffs as and for liquidated damages the sum of 100*l.* per acre or proportionately on a less acreage.

During 1926 the defendant leased the land in question to a company to be used for hop gardens only. When that lease commenced the hop vines on the land had grown to such an extent that the hops were formed and pickable, though unless there was some urgency they would not be picked till a few days later. As those hops were not delivered to the plaintiffs they claimed to recover as damages from the defendant 6300*l.*, being 100*l.* per acre :—

Held (1.) that as at the commencement of the lease of the sixty-three acres granted by the defendant the hops were in a pickable condition they had been grown or produced by him ; (2.) that the agreement between the plaintiffs and the defendant was not unreasonable as being in restraint of trade ; and (3.) that as a breach of the agreement might occasion serious damage which it might be difficult to value exactly or ascertain beforehand, the sum fixed by the parties as a pre-estimate of the damage—namely, 100*l.* per acre—was not a penalty but liquidated damages, which therefore the plaintiffs were entitled to recover.

Per Scrutton L.J. : The Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining.

Decision of Rowlatt J. reversed.

Appeal from a decision of Rowlatt J.

The plaintiff society, of which at all material times the defendant was a member, was registered under the Industrial and Provident Societies Act, 1893.

By an agreement in writing dated August 12, 1925, and made between the plaintiffs and the defendant, the defendant, for the consideration therein mentioned, agreed (inter alia) to deliver to the plaintiffs all hops grown by him during the year 1926 on certain land consisting of sixty-three acres, so that the same might be sold by the plaintiffs in the manner set out in Sch. I. to the agreement. The agreement further provided that if the defendant should fail to deliver to the plaintiffs any hops produced by him during the year 1926 on those sixty-three acres or should by himself or an agent or factor or in any way otherwise than through the plaintiffs dispose of those hops, the defendant should pay to the plaintiffs as and for liquidated damages the sum of 100*l.* per acre, or proportionately on any less quantity than an acre calculated on the acreage set out in Sch. II. to the agreement. By clause 4 of Sch. I. to the agreement it was declared that "the object of the society [the plaintiffs] is to organize the marketing of home-grown hops in this country by their sale through a single agency. This agency is the society. . . . ." Clause 23 was as follows: "The society is a selling agency acting for its members. It will not aim at making profits, but at paying all moneys received for hops sold to members, less the charges of sale and administration."

The plaintiffs alleged that in breach of the agreement the defendant during 1926 grew and produced hops on the said sixty-three acres, and failed to deliver them to the plaintiffs, but disposed of them otherwise. The plaintiffs accordingly claimed 6300*l.* as liquidated damages.

It appeared that in July, 1926, the defendant leased to a company called Surrenden Hops, Ld., for a term of five years from August 10, 1926, the sixty-three acres above mentioned to be cultivated as hop gardens. The defendant held the most of the shares in that company, and he in fact controlled it. On August 10, when the lease commenced, the hop vines on those sixty-three acres had grown to such an extent that the hops were formed and pickable, though unless there was some urgency they would not be picked till some days later. The hops grown on those sixty-three acres were not delivered to the plaintiffs.

The defendant admitted the agreement of August 12, 1925, but said that it was in restraint of trade and void and unenforceable, and he contended that he had not during 1926 grown or produced hops on the sixty-three acres, and, further, that the sum of 100*l.* per acre was a penalty and not liquidated damages. He denied that the plaintiffs had suffered any damage.

Rowlatt J. held that the lease by the defendant to Surrenden Hops, Ld., was not a sham but a real lease, and that having regard to the fact that the subject-matter of the agreement of August 12, 1925, was for the sale of hops if and when picked, he came to the conclusion that the defendant was not in what he did disposing of hops produced, but was merely disposing of land which had hops still growing upon it. In those circumstances the judge held that there had been no breach of the agreement by the defendant. Judgment was accordingly given in favour of the defendant.

Jowitt K.C. and *Harold Murphy* for the appellants.

Pritt K.C. and *Wilfrid Lewis* for the respondent.

The arguments sufficiently appear from the judgments.

Cur. adv. vult.

March 28. The following judgments were read:—

SCRUTTON L.J. This is an appeal from a judgment of Rowlatt J. in favour of the defendant, Sir E. Dering, who was sued by the English Hop Growers, Ld., for breach of contract. The plaintiff company were incorporated to protect the interests of individual hop growers, members of the company, by pooling their hops produced in the year, in order, by selling through the company "as selling agents acting for its members," to keep up the price of hops and prevent undue competition. The defendant had three defences: (1.) that he had not broken the contract; (2.) that the contract was unenforceable as in restraint of trade; and (3.) that the sum claimed was a penalty. Rowlatt J. decided that there was no breach, and did not, therefore, consider the other two defences.

The contract of August 12 contained a recital: "The Society has been formed to organize the marketing of home-grown hops in Great Britain by their sale through a single agency, and it is agreed by the rules of the Society that each of the members of the Society who is a grower of hops should enter into a contract with it in the terms hereinafter contained for the mutual advantage of all the members." Then it contained these clauses: "(2.) The grower hereby agrees with the Society that so far as the hop crops of the years 1925, 1926, 1927, 1928 and 1929 are concerned he will, subject to the now existing contract (if any) set out in the second part of the Second Schedule hereto, deliver to the Society all hops grown by him to the intent that the same may be sold by the Society in the manner set out in the said First Schedule." Clause 5 is: "The grower hereby agrees with the Society that he will not, as regards the crops for the said years 1925 to 1929 inclusive, produce hops upon any greater acreage than that set out in the first part of the said Second Schedule hereto or upon such larger acreage as the Society shall from time to time previously approve and consent to in writing." Clause 7: "The grower hereby agrees that if, as regards the crops for the said years 1925 to 1929 inclusive, he shall fail to deliver to the Society any hops produced by him or shall by himself or an agent or factor, or in any way other than through the Society dispose of any hops produced by him, otherwise than in pursuance of a now existing contract (if any) then and in that case he will pay to the Society as and for liquidated damages the sum of 100*l.* per acre or proportionately on any less quantity than an acre calculated on the acreage set out in the first part of the Second Schedule hereto." It will be seen that the phrases "hop crops," "hops grown by the grower," "hops produced by him," are used apparently as synonymous. Clause 5 of the prospectus uses them all indifferently.

The defendant entered into the contract in respect of fifty-three acres at Sheerland Farm, Pluckley, and ten acres at Rooting Farm, Pluckley. No question now arises with regard to the 1925 crop on these lands, which was marketed by the plaintiff company, though differences of opinion existed as to the results of the marketing. This action only relates to the 1926 crop. As to this it was cultivated by the defendant in the usual way. But on July 23, 1926, the defendant leased to a company called "Surrenden Hops, Ld."—Surrenden being the name of the defendant's residence—for a term of five years from August 10, 1926, certain hop gardens, being the sixty-three acres the subject-matter of the contract with the plaintiff company, with a covenant by the lessees, "To manage cultivate and manure the premises in a good and husbandlike manner in accordance with the most approved methods of hop growing and husbandry in the district in accordance with the Surrenden traditions and to keep and maintain the whole of the land as hop gardens and hop land only and to keep it clean and free from weeds and not to convert any part into pasture land." Shares to the extent of 700*l.* were issued in the Surrenden Company, of which Sir E. Dering held 500*l.*, his daughter 100*l.*, and a gentleman named Dyball 100*l.*; the latter's connection with the matter is not explained, excepting that he was one of the two signatories to the memorandum of association for one share. Sir E. Dering had obviously the control of the company, and was its creator. The judge finds as facts that on August 10, when the lease commenced, the hop vines had grown to such an extent that the hops were formed and pickable hops, though unless there was some urgency they would not be picked till a few days later, when their condition would have improved. Under these circumstances the defendant said: "I have not grown any hops or produced any hops on the contract lands; no hops are grown or produced till they are picked, and these hops were picked, and therefore grown or produced, by the Surrenden Estates, Ld., who have no contract with you." This idea seems to be founded on some mistaken impression that hop clusters are part of the land till they are severed, and only become "hops" or personal property when they are severed. This is a mistake. Hops while growing on the vine are fructus industriales, not part of the land while growing, but personal chattels, which pass to the executor and not to the heir: see per Littledale J. in *Evans* v. *Roberts* (1), who talks about growing crops being produced by the labour of the occupier; per Parke B. in *Rodwell* v. *Phillips* (2); and *Latham* v. *Atwood*. (3) Rowlatt J. very summarily took the view that if the defendant grew hops he was under no obligation to pick them; that there were no hops till they were picked; and that what the defendant had done was to lease land with hops still growing on it, which was not disposing of hops produced; in short, that in 1926 the defendant had not grown or produced any hops. I am quite unable to take this view. It appears to me that in 1926 the defendant had grown or produced a hop crop up to the point when it was pickable, though it would be better to wait a few days, and then disposed of it to persons other than the plaintiff company, so breaking his agreement with them. If the defendant had begun cultivating with hop vines more acres than his contract quantity, I cannot think he would be at liberty to say, if sued for an injunction to prevent him breaking clause 5 of his contract, that he was not "producing" hops. This is enough to establish a breach of contract in 1926, but I wish to say (though I do not express a final opinion on it, as the crops of 1927 are not before us) that when a landlord lets land with a covenant that it shall be used and cultivated as a hop garden according to Surrenden tradition, I think he is causing to be grown and growing hops within the meaning of the present contract, and is preventing himself from keeping his contract to allow the company to dispose of his hops as selling agent, and is disposing of his hops to others than the present plaintiffs. At present I think that when A. puts B. under a contractual obligation to do a particular act he causes the act to be done, and breaks any contract he may have made that he will not do that act; see my judgment in *Falcon* v. *Famous Players Film Co.* (4) I have myself a strong opinion as to the conduct of Sir E. Dering in this matter, but I think it better not to express it, and leave him to be judged by the Societies of Kentish Men and Men of Kent, and others prominent in the county of Kent, a county well known for honesty and good sportsmanship.

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(1) (1826) 5 B. & C. 829.
(2) (1842) 9 M. & W. 501, 503.
(3) (1636) Cro. Car. 515.
(4) [1926] 2 K. B. 474, 496.

There being then a breach, if the contract was enforceable, it was argued that it was not enforceable as in restraint of trade. It was not argued that its terms were unreasonable in the public interest, but that it was an unreasonable restraint on the individual. Oddly enough, one of the complaints was that there were not restraints enough on the conduct of the individual member, as the company ought to have taken power to compel its members to reduce their area of cultivation, and so avoid surplus production and lowered prices. It is now well established that the Courts will view restraints of trade which are imposed between equal contracting parties for the purpose of avoiding undue competition and carrying on trade without excessive fluctuations and uncertainties with more favour than they will regard contracts between master and servant in unequal positions of bargaining. Lord Haldane states the position thus in *North Western Salt Co.* v. *Electrolytic Alkali Co.* (1): "When the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves." I may also refer to the well known judgment delivered by Lord Parker in *Attorney-General of Australia* v. *Adelaide Steamship Co.* (2) and to the judgment of Younger L.J. in *Attwood* v. *Lamont* (3), which deals particularly with the distinctions between contracts of service and contracts for the sale of goodwill, which are allowed much greater freedom of contract, owing to the nature of the subject-matter, and the equal position of the contracting parties. I have always myself regarded it as in the public interest that parties who, being in an equal position of bargaining, make contracts, should be compelled to perform them, and not to escape from their liabilities by saying that they had agreed to something which was unreasonable. Here there is no allegation that the public interest is affected, and the defendant, an educated man of full age, was one of the principal promoters of the agreement which he now says is an unreasonable restraint of trade. In view of the fluctuating character of the yearly supply of hops, I see nothing unreasonable in hop growers combining to secure a steady and profitable price, by eliminating competition amongst themselves, and putting the marketing in the hands of one agent, with full power to fix prices and hold up supplies, the benefit and loss being divided amongst the members. It may be that it would have been better to put more restraints on the individual, but the members have agreed to less restraints, and I cannot say their action was unreasonable. In my opinion this defence fails.

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(1) [1914] A. C. 461, 471.
(2) [1913] A. C. 781.
(3) [1920] 3 K. B. 571.

There remains the defence that the sum claimed is a penalty, and not liquidated damages. I act upon the rules stated as the result of decided cases by Lord Dunedin and explained by Lord Parker in *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (1) If in a case where breach of a contract may occasion serious damage but damage which is difficult to value exactly, people contracting on equal terms agree beforehand to value or ascertain beforehand a conventional figure which shall represent on an average the probable damage from breaches of the same kind, I see no reason to interfere with their "genuine covenanted pre-estimate of damage," as Lord Dunedin describes it. That the damages are difficult to estimate is all the more reason why the parties should make their agreement effective and easy to enforce by previously agreeing a measure of damage. That damages of the same kind, but difficult to value exactly, may be averaged to avoid the difficulty seems to me also reasonable. The object of the present agreement, which is not to operate unless 90 per cent. of the total acreage is a party to it, is to secure in an industry where supply varies with the vagaries of climate, and where excessive supply and competition lowering prices may ruin people who have been drawn into the industry by the lure of excessive profits from short supply, a steady and regular return for capital. This is to be secured by putting all the produce of the members in the hands of one selling agent, who can keep a steady price, and avoid forcing supplies on the market, the expense and profit of these measures being borne by all the members alike. If any member breaks his contract by not bringing his produce into the pool controlled by the selling agent, and by offering it for sale through other selling agents at uncontrolled prices, he may cause damage to the association and its members which, while very substantial, will be difficult to value precisely. A member reducing the 90 per cent. acreage by breaking his contract may destroy the whole basis of the association. A member, by forcing his hops on the market, may render it impossible to maintain a controlled price. When it is known that 100*l.* per acre will be spent on preparing a hop garden, and 100*l.* per acre on annual cultivation, that on good ground you might get a ton of hops an acre, and that the price of a ton might go up to 240*l.*, or down to 120*l.*, or lower, I cannot see anything unreasonable in fixing the damages against a man, who having become a member, risked breaking up the whole system of the company by refusing to join in the pool, and entering into individual competition, at 100*l.* an acre brought into the scheme.

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(1) [1915] A. C. 79.

The strongest way of putting the argument against the contract is to say that if a grower only sells the produce of one acre independently he pays the same damages as he would if he sold the produce of all his acreage. But I do not think it is practical politics to invent a man who puts part of his produce in the pool and sells part outside; and his action in breaking away from the pool may have the same detrimental effect on the company, whether he breaks away in whole or in part. A similar objection was not considered valid by the Privy Council, when Lord Mersey gave the judgment in *Webster* v. *Bosanquet* (1), and I refer to his reasons.

In my judgment this objection to the claim also fails. The appeal must be allowed, and judgment entered for the plaintiffs for 6300*l.*, with costs here and below.

Sankey L.J. The plaintiffs in this case claim the sum of 6300*l.* as liquidated damages for breach of an agreement entered into between them and the defendant upon August 12, 1925.

For the defendant three points were taken: (1.) that there has been no breach of the agreement; (2.) that the agreement was void as being in restraint of trade; (3.) that the sum fixed in the agreement for liquidated damages was a penalty only. The learned judge decided in favour of the defendant on the first point, and from that judgment the present appeal is brought.

The facts are as follows: A number of persons in England, desiring to organize the marketing of home-grown hops in Great Britain, by their sale through a single agency, founded the plaintiff company in 1925. The defendant entered into an agreement with the plaintiffs above mentioned which provided, among other things, in para. 2: "The grower" —that is the defendant—"hereby agrees with the Society that so far as the hop crops of the years 1925, 1926, 1927, 1928, and 1929 are concerned he will subject to the now existing contract (if any) set out in the second part of the Second Schedule hereto deliver to the Society all hops grown by him to the intent that the same may be sold by the Society in the manner set out in the said First Schedule." Then by clause 7 it is provided what is to happen if the defendant breaks his contract. It reads, as far as the material part of it is concerned: The defendant "hereby agrees that if as regards the crops for the said years 1925 to 1929 inclusive he shall fail to deliver to the Society any hops produced by him or shall by himself or an agent or factor, or in any way other than through the Society dispose of any hops produced by him otherwise than in pursuance of a now existing contract (if any) then and in that case he will pay to the Society as and for liquidated damages the sum of 100*l.* per acre or proportionately on any less quantity than an acre calculated on the acreage set out in the first part of the Second Schedule hereto." Now the schedule attached to the agreement contained the following clauses: Clause 5 deals with membership. It says that "Every effort will be made to bring within the Society the existing growers of all hops produced in this country (except those grown by brewers) and the scheme will not finally be proceeded with unless the support is obtained of growers representing 90 per cent. of that total acreage." Clause 16 provides that: "All hops grown by members will be delivered to the Society through the factors to be at its absolute disposal in the same way as they have been at the disposal of the Controller." Clause 23 provides: "The Society is a selling agency acting for its members. It will not aim at making profits, but at paying all moneys received for hops sold to members, less the charges of sale and administration." For reasons which are immaterial to this case the defendant desired to get out of this agreement if he could, and a company was formed on July 22, 1926, under the name of Surrenden Hops, Ld., the majority of the shares in which are held by the defendant. On July 23 the defendant granted a lease to that company of the two farms on which he grew the hops in question, to come into force on August 10, thus, without begging the question at issue, putting it out of his power to deliver hops to the plaintiffs in 1926.

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(1) [1912] A. C. 394.

The learned judge finds that upon August 10 the defendant had grown hops to a point when they reached the form of pickable hops, but were not quite ready to pick, although if the threat of disease, or something else, had made it desirable, they might have been picked, and they could have been used. With the hops in this condition, he disposed of his farms to the company formed. As to (1.): Has there been a breach by the defendant of his agreement? It was contended that what the defendant sold (see clause 1 of his agreement) was hops grown by him, and that meant grown and severed by him, and the learned judge has taken this view. He says: "Having regard to the fact that the matter of the sale was hops if and when picked, and possibly dried, I have come to the conclusion that he did not dispose of the hops. What he did was to dispose of his estate by a lease to the newly formed company. He was not disposing of the hops produced, he was disposing of the land which had hops still growing upon it." I am of opinion that this is incorrect. It must be remembered that hops are not fructus naturales, but are fructus industriales: see per Parke B. in *Rodwell* v. *Phillips* (1); and having regard to the condition in which the judge found the hops actually were, and the contract under which the defendant agreed to deliver to the plaintiffs all hops grown by him, I have come to the conclusion that he did break his contract when he disposed of them to the new company, and not to the plaintiffs.

As to (2.): Was the agreement void as being in restraint of trade? The task of the Courts in considering contracts in restraint of trade is always a difficult one, because not only have the interests of the contracting parties to be considered, but also the interests of the public, and the latter are always susceptible to influences of current views of public policy. What was public policy in the time of Lord Macclesfield, who as Parker C.J. decided *Mitchel* v. *Reynolds* (2) in 1711, may have been quite different from that which existed in the time of Tindal C.J., who decided *Horner* v. *Graves* (3) in 1831, or from that which existed in the time of Lord Macnaghten, who decided *Nordenfelt* v. *Maxim Nordenfelt Guns & Co.* (4) in 1894. In *Mitchel* v. *Reynolds* (2) the area was a Holborn parish, in *Horner* v. *Graves* (3) an area of one hundred miles from York, in *Nordenfelt* (4) the area was unlimited. The judgment of Younger L.J. in *Attwood* v. *Lamont* (5) draws

(1) 9 M. & W. 501, 503.
(2) (1711) 1 P. Wms. 181.
(3) (1831) 7 Bing. 735.
(4) [1894] A. C. 535.
(5) [1920] 3 K. B. 571, 589, 590.

attention to this, and that case must be regarded as an authority that contracts between master and servant in restraint of the servant after leaving the master's employ stand on a different footing from other contracts in restraint of trade.

With regard to contracts of the present character, and also contracts restraining a vendor of the goodwill of a business from canvassing former customers, where the parties enter into an agreement with their eyes open, the Court should not, in my view, be astute to assist those who endeavour to break it, as Jessel M.R. said in *Printing and Numerical Registering Co.* v. *Sampson.* (1) "You have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract." There is still something to be said for the sanctity of contracts, and for the man who keeps his agreement, though it is to his own hindrance: see *Attorney-General of Australia* v. *Adelaide Steamship Co.* (2), where Lord Parker said: "The onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and . . . . if once the Court is satisfied that the restraint is reasonable as between the parties this onus will be no light one." In *North Western Salt Co.* v. *Electrolytic Alkali Co.* (3) Lord Haldane says: "When the controversy is as to the validity of an agreement, say for service, by which some one who has little opportunity of choice has precluded himself from earning his living by the exercise of his calling after the period of service is over, the law looks jealously at the bargain; but when the question is one of the validity of a commercial agreement for regulating their trade relations, entered into between two firms or companies, the law adopts a somewhat different attitude—it still looks carefully to the interest of the public, but it regards the parties as the best judges of what is reasonable as between themselves. In the present case I see no reason for doubting that in entering into the contract on which this action was brought

(1) (1875) L. R. 19 Eq. 462, 465.
(2) [1913] A. C. 781, 796.
(3) [1914] A. C. 461, 471.

the respondents were probably acting in their own best interest. It may well be that such a contract was, in view of the powerful position of the appellants, the respondents' best way of securing a market and adequate prices. And if this be once conceded I find nothing else in the detailed provisions of the contract excepting machinery for working out the bargain. If the general object was lawful, then these provisions were, in my opinion, free from objection on the score of illegality." Looking at the position in this case, I am unable to hold that the contract was in restraint of trade, either in reference to the interests of the contracting parties or in reference to the interests of the public. In the Schedule to the contract between the parties, it was stated that after consultation of the growers in the different counties they reported that in their opinion it would be in the interests of hop growers to consider seriously the possibilities of forming a growers' central selling agency, and the object of the plaintiff company was to organize the marketing of home-grown hops in this country by their sale through a single agency. I can see no evidence that such a selling agency was injurious, either to the interests of the defendant or in the interests of the public—although it might suit the defendant to try and get out of his contract in any particular year, while all those with whom he had been associated were held to be bound by it.

The Court will always be jealous to protect the public where any question arises as to a monopoly being created by a combination of buyers or sellers, but it regards the parties as the best judges of what is reasonable among themselves. The common law of England is no crystallized code; its adaptability is one of its chief advantages, and it seeks within due bounds to facilitate, not to fetter, trade and industry.

As to (3.): Is the sum claimed a penalty and not liquidated damages? The learned counsel for the defendant drew our attention to different contingencies under which a claim for liquidated damages arose. He pointed out the result of a breach in which the failure to deliver hops might be in respect of one pocket or a thousand pockets, and of a breach where the grower might dispose of them elsewhere. The law on this subject is most recently discussed by Lord Dunedin in *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* (1), where he sums up various propositions from decisions which rank as authoritative. He points out that the question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract judged of as at the time of the making of the contract, not at the time of the breach. It is quite reasonable for parties to the contract that they should estimate damages at a certain figure, and it is no obstacle to the sum stipulated being a genuine pre-estimate of damages that the consequences of the breach are such as to make a precise estimate an impossibility. One of the many tests whether a sum is liquidated damages or a penalty is where the damages arising from the violation of the contract cannot be exactly estimated beforehand.

In the present case it would be almost impossible to prove the damage caused by the defendant's breach of contract. It cannot be measured by the mere fact that he did not deliver a particular parcel of hops and that the plaintiffs were consequently unable to sell them. As was pointed out by the learned judge and accepted by the witness, the damage is really the undermining of the market and the undermining of the existence of the plaintiff company. It will not be forgotton that in the First Schedule to the agreement it is stated that the scheme would not finally be proceeded with unless the support was obtained of growers representing 90 per cent. of the total acreage of hops in the country. The failure of the defendant to fulfil his contract may be compared to the throwing of a stone into a pond. The effect extends to a far greater area than the mere spot into which the stone is thrown. The maintenance of an artificial price is a difficult and delicate operation. It may be upset by a trivial or unexpected occurrence, for example, by one important member deserting the combine or a small untied amount being placed

(1) [1915] A. C. 79, 86.

on the market. The damages in such a case are impossible to foresee or forecast. In *Webster* v. *Bosanquet* (1) on not dissimilar facts the sum in question was held to be liquidated damages. In my view the sum in question here is also liquidated damages and not a penalty. The judgment of the learned judge should be set aside and judgment entered for the appellants for the sum of 6300*l.*

Romer J. The first question to be determined on this appeal is whether the hops picked on the defendant's hop gardens at Surrenden in 1926 were hops produced by him within the meaning of clause 7 of the agreement of August 12, 1925. If they were, it is not disputed that he failed to deliver them to the society, and disposed of them otherwise than through the society. It is, however, contended on his behalf and the contention was accepted by Rowlatt J., that the hops were not produced by him, inasmuch as they were picked by his lessees, Surrenden Hops, Ld., after the commencement of and under the powers conferred upon them by the lease of July 23, 1926. The learned judge came to the conclusion that the obligation of the defendant under clause 2 of the agreement, whereby the defendant agreed to deliver to the society all the hops grown by him, was merely an obligation to deliver hops if and when picked and possibly dried by him, and that he did not therefore dispose of or fail to deliver hops produced by him within the meaning of the agreement. With all respect to the learned judge I am unable to agree with him as to this. The state of affairs as existing upon August 10, 1926, the date of the commencement of the tenancy, was found by him to be this. The defendant "had grown hops to a point when they were not quite ready to pick; they were formed, they had reached the form of pickable hops, but they were not quite ready to pick although if the threat of disease or something else had made it desirable they might then have been picked and they could have been used, although it would have been a wasteful thing to do." With this finding I respectfully agree. But it makes it clear that on August 10 there were hops in a pickable form, and that these hops had been grown or produced (for I draw no distinction between the two words for the present purpose) by the defendant, and when some three weeks later these hops were picked and dried they still, in my opinion, were in fact and could properly be described as hops grown or produced by the defendant. It was, however, urged on his behalf that the parties to the contract could not have intended to place him under an obligation to deliver to the society hops grown but not picked by him, inasmuch as the hops might in certain circumstances turn out not to be worth the picking. In that case, it was said, the fulfilment of his obligation would merely serve to throw upon the defendant a useless expense without any benefit accruing to the society. But the contract is one made between business people who at the time of making it, at any rate, may be supposed to have been trusting one another to behave in a businesslike way. If the hops were not worth picking it is almost inconceivable that the society would not relieve the defendant from his obligation to deliver them the moment that their attention was called to the fact. It is, at any rate, much more probable that the parties intended to enter into an arrangement that was capable of working quite satisfactorily on these businesslike lines, than to enter into one that would have been so extraordinarily unbusinesslike as that for which the defendant is contending. If the defendant be right, he could sell his hops the day before they were picked by the purchaser from him and render the agreement entirely useless from the point of view of the society. There would indeed, on the defendant's construction of it, have been no reason for the society entering into it at all. If the defendant was to be at liberty up to the time of picking the hops to sell them where he pleased, the society might just as well have saved themselves the trouble of negotiating the contract, and taken the risk of being able from time to time to compete successfully with the rest of the world for the purchase of the defendant's crops. But if this was to be the position of the society in relation to the defendant it would be their position in relation to the rest of their members, and there would be no reason for the existence of the society at all.

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(1) [1912] A. C. 394.

I must now turn to the question whether the agreement is an illegal one as being in unreasonable restraint of trade. As to this point, on which Rowlatt J. expressed no opinion, it is conceded by the defendant that the agreement is not unreasonable so far as the public interest is concerned. He contends, however, that the plaintiffs have not shown that it is reasonable as between the parties themselves. In my opinion this contention cannot be sustained. It was stated in evidence by Mr. Overy on behalf of the plaintiffs that, when the society was formed at the end of the period of the Government control of hops, there was a large stock, and ruin to the hop growers was in prospect; that in a year when there was no bigger surplus he had sold hops for less than the price of picking them, and that in such circumstances only the biggest men survive and make a profit out of those who are extinguished. The society was accordingly brought into existence for the purpose, as stated in its prospectus, which is scheduled to the contract, of organizing the marketing of home-grown hops by their sale through a single agency. For this purpose members were required to enter into a binding contract with the society to deliver all hops grown by them for a period of five years for sale through the society, and the prospectus states how the money realized by the sales is to be distributed among the members. Shortly stated, the scheme was one by means of which it was hoped that in a year when there was a surplus of hops the loss occasioned to the members as a whole was to be reduced to a minimum and the loss equitably distributed amongst them. All this is apparent upon the face of the agreement itself, which was entered into for the purpose and in pursuance of the scheme. Similar agreements were, so we were told, entered into by some 95 per cent. of the hop growers in this county, excluding brewers. It is they who are the members of the society that in each case is the other party to the contract. How in these circumstances it can be said that the contracts are unreasonable as between the society

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and the member in question passes my comprehension. It may be safely assumed that this large body of hop growers knew their own business best and what it was reasonable to do in the circumstances with which they were confronted. But in any case, given the circumstances and given the object which they had in view, I am unable to see how that object could have been attained by any better or fairer means than those provided by the agreement. In my opinion the agreement is entirely reasonable as between the parties.

The only point remaining to be dealt with is whether the 100*l.* mentioned in clause 7 of the agreement is a penalty or liquidated damages. Here again it became unnecessary for Rowlatt J., in view of the conclusion at which he arrived upon the first point, to express any opinion. I may therefore, without any want of respect to the learned judge, content myself with saying that for the reasons already given by the Lords Justices I concur with them in thinking that the sum in question is not a penalty but is liquidated damages. I agree that the appeal must be allowed with the consequences stated.

Appeal allowed.

Solicitors for appellants: *Ellis & Fairbairn.*
Solicitors for respondent: *Mackrell, Ward & Knight.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1928
March 20, 21.

H. J. GREEN (INSPECTOR OF TAXES) *v.* J. GLIKSTEN AND SON, LIMITED.

Revenue—Income Tax—Insurance against Fire—Loss of Stock in Trade by Fire—Insurance Money exceeding Amount at which Stock in Trade valued in Books—Inclusion of Whole in Profit and Loss Account as a trading Receipt—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case* 1.

A quantity of timber belonging to a company carrying on business as timber merchants was destroyed by fire. In the company's accounts the timber was valued at cost or market value, whichever was the lower, and for this purpose large sums were in the last two years of account before the fire written off the cost price in respect of depreciation in order to arrive at the closing stock values. The reduced sums so arrived at were adopted each year in order to arrive at the company's profits for income tax purposes. The company kept its stock in trade insured against loss or damage by fire; and for the purpose of fire insurance the stock in trade was valued at replacement value. At the date of the fire the value of the stock destroyed was very high owing to a boom, and the insurance companies paid 477,838*l.* in respect of the replacement value. The sum of 160,824*l.* was the estimated book value of the timber destroyed. This sum was brought into the company's accounts as a trading receipt, and the balance of the sum of 477,838*l.* (after some small deductions) was carried into the balance sheet as a reserve and was not brought into the profit and loss account:—

Held, that the company must bring the whole of the money received from the insurance companies in respect of the timber destroyed by fire into their profit and loss account as a trading receipt in order to arrive at the company's profits for income tax purposes.

Decision of Rowlatt J. [1928] 1 K. B. 475 affirmed.

APPEAL from a decision of Rowlatt J. (1) allowing an appeal from the Commissioners for the Special Purposes of the Income Tax Acts on a case stated under s. 149 of the Income Tax Act, 1918, for the opinion of the High Court.

At meetings of the Commissioners held on June 25, 1924, and April 6, 1925, for the purpose of hearing appeals, the appellants J. Gliksten & Son, Ld. (hereinafter called "the Company"), appealed against an assessment to income tax in the estimated sum of 100,000*l.* for the year ending April 5, 1924.

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(1) [1928] 1 K. B. 475.

The company was incorporated under the Companies Acts, 1862 to 1900, on December 14, 1905, and carried on business as timber merchants at Carpenter's Road, Stratford. On August 8, 1921, a large quantity of timber stored in the company's timber yard was destroyed by fire, and in respect of this timber the company received in February, 1922, 477,838*l.* from various insurance companies. The timber so destroyed consisted mainly of the best class of hardwood, which was purchased by the company seasoned, unseasoned or partly seasoned, and included a large quantity of seasoned wood which was taken into stock before the war.

The company's accounts were made up to June 30 in each year, stocks being valued, following the usual practice, at cost or market price, whichever was the lower; and for the purpose of this valuation large sums were in the last two years of account before the fire written off the original cost prices of the stock in respect of depreciation in order to arrive at the closing stock values. The reduced sums so arrived at were adopted each year in order to ascertain the company's profits for income tax purposes. In respect of the stock on hand at June 30, 1921, the sums so from time to time written off the stock values amounted in the aggregate to 107,000*l.*, and the total stock on hand was thus valued in the company's accounts at 266,831*l.*

For many years past the company had kept its stock in trade insured against loss or damage by fire, and had in computing its profits for income tax purposes been allowed to deduct the premiums paid by it in respect of the policies of insurance as an expense of the business. For the purposes of fire insurance the stock in trade was valued at replacement value. At the date of the fire the value of the timber of the kind which constituted the greater part of the company's stock was very high, and the company received in respect of the replacement value of the stock destroyed the sum of 477,838*l.* 2*s.* 4*d.* Out of this sum the sum of 160,824*l.* (being part of the sum of 266,831*l.*, the value of stock on hand at June 30, 1921), estimated by the company to be the written down value of the timber destroyed, was brought in the

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company's accounts for the year ending June 30, 1922, as a trading receipt.

After deducting the sum of 2485*l.* for law charges, the sum of 1000*l.* for expenses of clearing the yard and the said sum of 160,824*l.*, the balance of the money received from the insurance companies, amounting to 313,168*l.*, was carried into the balance sheet for the year ending June 30, 1922, as a reserve, but was not brought into the profit and loss account. The trading account for the year ending June 30, 1922, and the fire account are set out in the report of the case before Rowlatt J. (1)

Mr. F. W. Gower, chartered accountant and advisory accountant to the Inland Revenue Commissioners, who was examined on behalf of the respondent (the Inspector of Taxes), stated in evidence that in his experience as a chartered accountant, extending over twenty years, the normal commercial method of dealing with money recovered by a trader under a policy of insurance in respect of stock destroyed by fire was to include the actual amount received in the accounts as an ordinary trading receipt, in the same way as the proceeds of an ordinary sale of stock.

During the war the greater part of the company's trade consisted in supplying seasoned and specially selected timber of various kinds to Government departments and various aircraft contractors. The timber required for these purposes, being of a special character, had to be and was picked out from the company's stocks. The whole of the company's stocks of the required types of timber, such as silver spruce, mahogany, walnut and English ash, had (before the fire) been gone over in this way, and the company was at the date of the fire left in possession of such portions of these stocks as had not been found suitable for the above mentioned purposes. Since the armistice the company had done an increasing business with the motor body building and like industries, and this class of lines had led to demand for, and the company had stocked, timber of types and qualities different from those stocked by the company during and

(1) [1928] 1 K. B. 477, 478.

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before the war. For this reason only a small portion of the timber destroyed by the fire had been replaced—namely, to an amount of 18,400*l*. or thereabouts.

At the date of the fire there was a boom which was being prolonged by the adoption on the part of the larger timber merchants of a policy of holding up stocks; the high prices obtaining at that time, and on the basis of which the insurance companies paid the company's claim, were due to this boom. The timber destroyed was of such a character that it would have been practically impossible to have put it on the market without causing a glut and destroying the market for the time being.

The Special Commissioners decided that the sum of 477,838*l*. recovered from the insurance companies did not represent a trade receipt, and that no part of that sum was assessable as trade profits under Case 1 of Sch. D. They expressed the opinion that the burned timber which had been replaced, which amounted in value to 18,400*l*., "should be brought into stock at the original cost price of the timber." On appeal Rowlatt J. held that the whole sum of 477,838*l*. must be brought into profit and loss account as a trade profit for the purpose of assessment to income tax.

The company appealed.

Maugham K.C., *Latter K.C.* and *Cyril King* for the appellants. The whole sum recovered from the insurance company is not a profit of the trade or business so as to be liable to income tax under the Income Tax Act, 1918, Sch. D, Case 1. The position in regard to property destroyed by fire which was insured is made clear by r. 3 (*k*) of the Rules applicable to Sch. D, Cases 1 and 2. The effect is that in this case the value of the timber as shown in the balance sheet cannot be treated as lost, as that amount of insurance money has been received in respect of it. *Inland Revenue Commissioners* v. *Newcastle Breweries, Ld.* (1) is distinguishable, for that was a case of a compulsory sale. The fact that the vendors could not fix the price of their rum

(1) (1927) 12 Tax Cas. 927.

or prevent the Admiralty having it did not make it other than a sale in the course of the trade.

[LORD HANWORTH M.R. It was there said that a sale in the course of trade had been prevented, and that so much capital had been extracted from the company, as in *Glenboig Union Fireclay Co.* v. *Inland Revenue Commissioners.* (1)]

The decision really turns on its being a sale. Here no such point can arise. The question here is a novel one, and is one of how a loss by fire covered by a contract of indemnity entered into in the ordinary course of business by a trading company should be dealt with, when a larger sum is received under the contract of indemnity than the value at which the property destroyed properly stood in the balance sheet. The sum received on the insurance policy is not a profit of the business, for it is not the business of a timber company to have fires. The matter is completely covered by r. 3 (*k*) of the Rules applicable to Cases 1 and 2, which provides that: "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of . . . . any sum recoverable under an insurance or contract of indemnity." All the cases of sales depend for their decision on the fact that a sale is an incident of the trade. A fire is not.

The amount received from the insurance company in excess of the value of the property destroyed as set out in the balance sheet is a windfall not resulting from carrying on the trade. It is like a nugget of gold dug up on property of the company, and has nothing to do with carrying on the business of timber merchants.

[LORD HANWORTH M.R. Is not the true position that part of the company's circulating capital has been converted into cash and, if so, ought not the amount received to appear in the accounts as part of the circulating capital? Is not this case rather like *Gloucester Railway Carriage and Wagon Co.* v. *Inland Revenue Commissioners*? (2)]

Not everything received during a year is a profit of the year's trade. There may be windfalls. Rule 3 (*k*) does not provide that the insurance money should be substituted for the property destroyed, but only that in so far as the loss by fire is covered by insurance, it shall not be deducted as a loss. It follows that the sum recovered has not got to be brought into account. The fact that insurance is effected in the ordinary course of business is recognized by the Crown, which makes an allowance in respect of the premises. This is the justification for r. 3 (*k*), and there is no reason for going beyond it. To show that the money received on an insurance policy is not profit of a trade, take the case when a shop is burned down and the owner goes out of business, and has subsequently received money under a policy of insurance of his stock in trade. In this case there is no trade being carried on when the money is received. It may be the last act of a trader to sell his stock in trade, but it was no part of the trade to have a fire.

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(1) (1922) 12 Tax Cas. 427.
(2) (1925) 12 Tax Cas. 720.

Further, the second finding of the Commissioners was that timber replaced must go into the company's accounts and should be brought into account at the original cost price of the timber before the fire gave full effect to r. 3 (*k*). Thus if the whole sum of 477,838*l.* had been applied in replacing the timber, it would only have appeared in the account at the value at which the timber stood in the account before the fire, and the Crown would get the full benefit of a profit on the sale as though there had been no fire. That is, it is submitted, correct, and the result will be that as further parts of the sum received are applied in replacements, the timber will go into the accounts at the old value.

Sir Douglas Hogg, A.-G. and *R. P. Hills* for the Commissioners were not called upon.

LORD HANWORTH M.R. This case is an interesting one, and has given rise to an interesting argument by Mr. Maugham and Mr. Latter. But we have come to the conclusion that the decision of Rowlatt J. is right.

In this case we have to deal with what I may call the proceeds of a fire. The company are engaged in large business in the timber trade, and in their accounts, which were made up to June 30 in each year, the stocks were valued at the cost or market value, whichever was the lower, and for the purposes of valuation large sums were, in the last two years of account before the fire, written off the original cost prices of the stock in respect of depreciation. A fire took place on August 8, 1921, and a large amount of the timber was burnt. The actual amount of timber which was destroyed stood, at that valuation of cost or market value, at a sum of 160,824*l.* The company were insured in several insurance companies, and the ultimate amount which was received from the insurance companies in respect of that timber was the sum of 477,838*l.* The discrepancy between the book value of the timber destroyed and the actual sum received from the insurance companies is explained in the case, which says: "At the date of the fire there was a boom, which was being prolonged by the adoption on the part of the large timber merchants of a policy of holding up stocks; the high prices obtaining at that time and on the basis of which the insurance companies paid the company's claim were due to this boom." In other words the company were fortunate, because the contract of fire insurance being one of indemnity, the timber company were able to say to the fire insurance companies: "You must give us the sum of 477,838*l.*, because if we were to go into the market to replace in specie the timber which we have lost by fire we should have to expend that amount, although in our books we were carrying that timber at a value of 160,824*l.* and no more." The question arises, how the large sum received from the insurance companies ought to be dealt with in the trading account of the timber company for the purposes of income tax.

It is said on behalf of the timber company that their business is one for the buying and selling of timber, but that they do not carry on a trade in fires. They say that the misfortune which has overtaken them is one which is no part of their business, that they do not contemplate a fire in the ordinary course of business, and therefore that the large figure received from the insurance companies must be taken as an indemnity for the book value of the timber, 160,824*l.*, and no more. And they suggest that the amount

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they have received from the insurance companies beyond that figure is a windfall like a nugget of gold dug up on their premises, which is unconnected with their trade and does not fall into their trading account for subjection to income tax.

I think one must look a little more closely into the nature of the business of the timber company. We have before us an account attached to the case and set out conveniently in the report of the case before Rowlatt J. (1) On one side of the account there are the stock in trade, purchases, the charges for freight, carriage and cartage, lighterage, insurance. All those items fall rightly within the trade account. The expenses of freight for bringing fresh stock in trade to the premises of the company, and of insurance of the stock in trade in transit or after its arrival, are all items which are rightly found in the trading account as part of the ordinary business of the trader. On the other side of the account there are the sales less returns, the stock in trade, and the timber destroyed at estimated cost prices. I have examined that trading account because I think it shows conclusively, as one would expect, that insurance, whether against marine risks or fire risks, is a part of the ordinary duty of the trader in carrying on his business. It is quite true that the timber company does not trade in fires. But governed by ordinary business prudence, and mindful of the fact that untoward events take place both by land and by sea, the company takes steps to insure an indemnity being paid to them whether they lose their stocks in transit by perils of the sea or in situ on land by the misfortune of fire.

It is pointed out, and much stress is laid upon it, that the premiums paid for insurance, whether marine or fire, are proper subjects for deduction in the ordinary trade account, and attention is then called to the deductions which are allowed in computing the amount of the gains or profits to be charged for income tax. These are catalogued in r. 3 of the Rules applicable to Cases 1 and 2 under the Income Tax Act, 1918. It is true that in form that rule is negative; but, while it restricts deductions and says that no sums should be deducted in respect of the matters mentioned, it must be read as allowing a deduction to be made in certain other cases. The particular item to which our attention is called is r. 3 (*k*). Rule 3 (*k*) runs in this way: "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of any sum recoverable under an insurance or contract of indemnity." As Mr. Maugham has pointed out, some explanation of those words is necessary. It seems to contemplate that there has been a loss in respect of which there is an indemnity recoverable. Therefore one must read it as prohibiting a deduction, where there has been a loss, in respect of the sum recovered in respect of that loss under a contract of indemnity. In other words, it forbids your treating as a loss a sum which in fact is recoverable under a contract of indemnity. Thus if there is a loss of 100,000*l.*, and a portion of that sum, let us say 75,000*l.*, is recovered under a contract of indemnity, then to the extent of that 75,000*l.* no deduction is to be made as on a loss, because instead of its being a loss it has been recovered under a contract of indemnity. But r. 3 (*k*) appears to contemplate that if, and so far as, there is a loss, and it is not recovered under a contract of indemnity, that loss would be a sum which could be deducted. I am, myself, however, unable to find in r. 3 (*k*) any definite ground for the determination of this case, and I think Rowlatt J. has treated the question from the right point of view.

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(1) [1928] 1 K. B. 475, 477.

The appellants were traders in timber; it was their business to buy and sell timber, and it was a part of their business—ancillary perhaps—to take steps to insure their trade against mischances such as perils of the sea and perils of the land. They had a certain amount of fixed capital in their business, and they had a certain amount of circulating capital employed in the purchase of stock, which is enhanced again when the stock is sold. A part of that circulating capital was invested in timber. That timber might have been sold in the ordinary course of trade, but instead of being sold it was burnt. Under a contract of indemnity, properly entered into for the purpose of safeguarding the business against

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this risk, a sum has been received in respect of the timber. That amounts to a restoration to the circulating capital of a sum which had previously been invested in specie in timber. For this purpose regard must be had to the actual sum received, which is a sum received in the ordinary course of business, taking into account the ordinary safeguards of business. As Rowlatt J. says (1): " It seems to me that the respondents must account for this timber that has been destroyed by fire; they have received the money from the insurance company in place of it. . . . . The fact is that the respondents' business is to buy, hold and sell timber, and it is part of their business to insure timber while they have it, in order that if the timber is destroyed they may have the insurance money instead of the timber, and, in my judgment, they must treat that money in the same way as they would have treated the timber—namely, as an item in their trading account." Those are the words of Rowlatt J. I think they are right, and therefore that the appeal fails.

I would like to add one word on another topic, because it appears to me that the case is one which is clearly open to review by the Court. The Special Commissioners, somewhat curiously, appear to have made a finding which, as I understand it, appears to be in direct conflict with the evidence of Mr. F. W. Gower. Why they set that evidence out in the case, if they did not accept it, I cannot imagine. There was no evidence called on the other side, we are told, and Mr. Gower's evidence is this: " The normal commercial method of dealing with moneys recovered by a trader under a policy of insurance in respect of stock destroyed by fire was to include the actual amount received in the accounts as an ordinary trading receipt in the same way as the proceeds of an ordinary sale of stock." That is the evidence as it stands. Upon that, without any comment from the Commissioners, they say: " We are satisfied that the sum . . . . recovered from the insurance companies, does not represent a trade receipt." I find some difficulty in seeing what evidence there was upon which the Commissioners could come to that conclusion, having regard to the evidence which they themselves have set out in the case stated. I make that observation by the way, but it certainly shows that the Commissioners have dealt with a matter of law—namely, the proper way of dealing with the insurance money in a trading account. For the reasons I have given I think that it is an ordinary item in respect of the circulating capital of the trading company which has to be brought into the trading account and dealt with at its true value, and not at an artificial value, based upon the book values of the timber actually in stock.

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(1) [1928] 1 K. B. 481.

For those reasons I think the appeal fails and must be dismissed with costs.

Sargant L.J. With great respect to the arguments of Mr. Maugham and Mr. Latter it seems to me that this is a very plain case. We have to consider whether in computing under the Rules applicable to Sch. D, Case 1, the profits or gains of this company, this large sum of over 400,000*l.* received from the insurance companies under the policies of insurance against fire, is to be taken as being one of the gains to be brought into account.

The company, trading as a timber company, in the ordinary course of business insured its timber against loss or damage by fire. The premiums were an ordinary trade outgoing, allowed for, of course, in the trading account. Fire is an event which has to be taken into account as an ordinary risk of a company of this kind, and in consequence of the insurance this very large sum was recovered. To my mind, on the face of the transaction itself, the whole of the amount so recovered is clearly an amount which ought to be brought in. It is an ordinary receipt in the sense, not that it occurs every year or regularly at stated periods, but that it is a receipt which would ordinarily be received in case the risk insured against should happen. A great deal has been made, or attempted to be made, of r. 3 (*k*). To my mind that rule does not affect the matter in any way. I do not think there is any real doubt about the effect of the rule. The words of the rule are: " In computing the amount of the profits or

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gains to be charged, no sum shall be deducted in respect of any sum recoverable under an insurance or contract of indemnity." It seems to me that head (*k*) assumes that there has been a loss, and that the loss is one which is wholly or partially covered by an insurance or contract of indemnity; and the effect of the words seems to me quite clear—namely, that to the extent to which the loss is met by the sum recoverable under the contract of indemnity or insurance, the loss is not chargeable in the ascertainment of profits and balance of profits. To my mind the broad meaning of those words is, so far as it goes, rather against the appellants than in their favour because, broadly speaking, I think the words mean that the amount recoverable in such a case is to take the place of the asset lost, so far as the amount recoverable goes. What is said by the appellants is, that you must take account not of the actual sum recovered but only of the book value, in the company's books, of the timber destroyed; and that as regards any excess of the amount recovered over the book value, that is a mere windfall, and is not to be accounted for at all. I fail to follow that argument altogether. To my mind the book value of the timber in the company's books has nothing at all to do with the amount of the loss or with the amount which has been recovered in respect of the loss. The amount recovered is a gain of the company in the course of its business no less than the sale price of the timber would have been, if the timber had been sold in the course of ordinary sales during the continuance of the company's business; and in estimating the balance of the profits or gains which the company has to bring into account for the purposes of income tax, the amount of the excess of the sum recovered over the book value of the timber in the company's books has to be brought into account just as fully and completely as if there had been a sale in the ordinary course of business at that price, in which case it is conceded by the appellants that the full amount of the difference between the sale price and the book value in the company's books would have had to be brought into account. I agree that the appeal should be dismissed.

LAWRENCE L.J. I agree. The appellants contend that the difference between the book value of the timber and the amount paid by the insurance companies is not a trading receipt but is in the nature of a windfall, and in support of that contention they rely mainly upon r. 3 of the Rules applicable to Cases 1 and 2 in Sch. D. Their contention is that r. 3 (*k*) negatives the idea of bringing in the insurance money as one of the items of receipt, that what has to be brought in is the book value of the stock which has been burnt, and that the excess over that value is not a trading receipt and does not stand on the same footing as the proceeds of sale of the stock. In my opinion that contention is not well founded. The effect of r. 3 (*k*) in my judgment is that, in arriving at the balance of profits or gains there has to be no deduction in respect of a loss which is covered by insurance to the extent to which that loss is recoverable. But that in no way negatives the idea that if the true value of the stock burnt is received from the insurance companies, such receipt is a receipt in the ordinary course of the company's business. I agree, of course, that a fire is not an ordinary incident in a trading business; but if it does occur I think the receipt from the insurance company is an ordinary receipt in that it is a receipt which an ordinary trader generally stipulates for in case his stock is burnt. I agree with Rowlatt J. that the insurance money ought to be treated, for the purposes of ascertaining the balance of profits or gains, as an ordinary trading receipt in the same manner as the proceeds of sale of the stock would have had to be treated had the stock been sold.

I agree that the appeal fails and ought to be dismissed.

Solicitors: *Ward, Perks & Terry; Solicitor of Inland Revenue.*

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BELL AND ANOTHER *v.* BENNETT.

Mines—Coal Mine — Check Weigher — Method of Appointment — Right to Payment—Check Weigher appointed by Minority—Notice of Meeting — Validity — Coal Mines Regulation Act, 1887 (50 *&* 51 *Vict. c.* 58), *s.* 13, *sub-s.* 1; *s.* 14, *sub-s.* 1 — *Coal Mines* (*Weighing of Minerals*) *Act,* 1905 (5 *Edw.* 7, *c.* 9), *s.* 1, *sub-ss.* 2, 3, 5; *s.* 3.

A check weigher in a coal mine appointed by a majority, ascertained by ballot, of the persons employed in the mine, and paid according to the mineral gotten, and acting as such check weigher, is entitled to payment of a proportionate part of his wages from all persons so employed and paid, and it is no defence to such claim against any one of these persons that another check weigher has been appointed, during the material period, by ballot, but not by a majority as aforesaid, to act as check weigher on his behalf.

A notice convening a meeting to appoint a check weigher addressed to a part of those entitled to appoint is bad, and the appointment of a person chosen by the subsequent meeting is invalid.

APPEAL from Newcastle-on-Tyne County Court.

The plaintiffs, the respondents, George Bell and Wheatley Jacobson, as check weigher and deputy check weigher, duly appointed within the meaning of s. 14, sub-s. 1, of the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), by the majority, ascertained by ballot, of the persons employed at Greenside Colliery, Durham, who were paid according to the weight of the mineral gotten by them (called herein "the majority check weighers"), claimed from the defendant, the appellant, Peter Bennett, one of the persons so employed and so paid, 10*s.* 2*d.*, being his proportion of the plaintiffs' wages or recompense as check weighers, the amount not being in dispute.

Greenside Colliery was closed during the coal strike in 1926, and was reopened in December of that year. Before the strike all the employees of the mine belonged to the Durham Miners' Union, but after the strike a new, non-political union was formed called the Greenside All-Grades' Union. On December 10, 1926, the following notice, signed by the secretary of the All-Grades' Union, was posted up: "Greenside All-Grades' Union: Mr. Matthew Golightly and Mr. M. R. Clark are the two nominations for check weighman.

The ballot will take place in the Shelter on Saturday, December 18, 1926, between the hours of 11 A.M. and 12.30 P.M." There were 217 workers paid by weight in the mine, and 84 voted for Clark, who was elected. On December 30 a statutory declaration was made under s. 1, sub-s. 2, of the Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), by the chairman of the meeting which had appointed Clark, declaring that the latter had been duly appointed check weigher and (in pursuance of sub.-s. 3) setting out the names of the 84 persons, all members of the All-Grades' Union, by whom Clark had been appointed. This was sent to the owners, the Stella Coal Company, Ld. Clark commenced to act as check weigher on January 3, 1927. On January 3, 1927, a general notice was posted headed "Weigh Fund Meeting," calling a meeting for January 5 to nominate for the post of check weighman, and the plaintiffs were duly nominated. The Weigh Fund was not connected with any particular union, but through it the check weighman was paid his wages. On January 7 the ballot was held, 264 being entitled to vote, and 176, being a majority, voted for the plaintiffs as check weighman and deputy check weighman. On January 10 the statutory declaration was made, and the plaintiffs commenced their duties. On February 2 notice of a meeting for February 5 was given, when the question was put: "Are you in favour of Clark representing you as a check weighman?" and, out of 380 entitled to vote, 186 voted against him and 63 in his favour.

The question for the Court was whether the plaintiffs were entitled to be paid by the defendant notwithstanding the fact that another check weighman had been appointed by the defendant, as one of the minority appointing, to act on his behalf.

The county court judge held that Clark's appointment was invalid. He also held that even if his appointment was valid he had been properly removed on February 5, and gave judgment for the plaintiffs.

The defendant appealed.

Luxmoore K.C. and *A. Wilson* for the defendant. The plaintiffs are not entitled to receive payment from the defendant. As appears from s. 1, sub-s. 3, of the Coal Mines (Weighing of Minerals) Act, 1905 (1), there are two methods of appointing a check weigher; both are statutory in that they are recognized by the statute, although it is nowhere enacted how a check weigher is to be appointed. One method is by a majority, ascertained by ballot, of all the persons employed in the mine and entitled to be paid according to the mineral gotten. The other method is appointment by those whose names are to be set out in the statutory declaration delivered to the mineowners, under s. 1, sub-s. 2, of the Act of 1905, by the chairman of the meeting making the appointment. At the time of the appointment of Clark there was no majority check weigher in existence, and, assuming that Clark, as is contended, was properly appointed, the subsequent appointment of the plaintiffs would not affect his position, as the statute recognized both appointments. The statute did not say that on the appointment of a majority check weigher any other appointment was revoked. The appointment of Clark created a private relationship between him and those appointing him, which they, collectively or severally, could terminate at any time, while the majority check weigher can only be removed by ballot under s. 1, sub-s. 5. The county court judge has held that Clark's appointment was invalid, as the notice of December 10, 1926, was not good under s. 3 of the Act of 1905, because it was not addressed to all entitled to appoint. But that section says: "All persons who are entitled . . . .

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(1) Coal Mines (Weighing of Minerals) Act, 1905, s. 1, sub-s. 3: "Where the check weigher or deputy check weigher was appointed by a majority, ascertained by ballot, of the persons employed in the mine, and paid according to the mineral gotten, the [statutory] declaration [of the chairman of the meeting appointing the check weigher] shall so state, and, if he was not so appointed, then it shall state the names of the persons by whom or on whose behalf the check weigher or deputy check weigher was appointed. Where a check weigher or deputy check weigher is appointed by such a majority as aforesaid, he shall be deemed to be appointed on behalf of all the persons employed in the mine who are entitled to appoint him."

to appoint a check weigher" shall have notice. This means entitled to appoint a majority or entitled to appoint a minority check weigher, and due notice was given to the latter, i.e., to the members of the All-Grades' Union. The purported removal of Clark by the ballot of February 5 was invalid, for the Act prescribes no method of removing a minority check weigher.

Sir H. Slesser K.C. and *C. B. Fenwick* for the plaintiffs. The plaintiffs are exactly within the words of s. 14, sub-s. 1, of the Coal Mines Regulation Act, 1887 (1), under which they are claiming. They were appointed by the majority, ascertained by ballot, of the persons employed in the mine paid according to the weight of mineral gotten by them, and they have acted as check weighers. By s. 1, sub-s. 3, of the Act of 1905 (2), they are deemed to be appointed on behalf of all those entitled to appoint them, and this includes the defendant. A check weigher elected to represent some of the men only is really an interloper: see *Thorpe* v. *Davies.* (3) Although the defendant is liable to pay the plaintiffs it may well be that he is also liable to pay Clark.

Clark was never properly appointed, because the notice of December 10 was a bad notice under s. 3 of the Act of 1905, which enacts that it must be given to "all persons who are entitled . . . . to appoint a check weigher." The notice was only directed to a limited number, the members of the All-Grades' Union. Moreover, no opportunity was given of nominating candidates, the notice stating that Golightly and Clark had been already nominated. The Court should be satisfied that there was a real electing: per Lord Coleridge C.J.

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(1) Coal Mines Regulation Act, 1887, s. 14, sub-s. 1: "Where a check weigher has been appointed by the majority, ascertained by ballot, of the persons employed in a mine who are paid according to the weight of the mineral gotten by them, and has acted as such, he may recover from any person for the time being employed at such mine and so paid, his proportion of the check weigher's wages or recompense, notwithstanding that any of the persons by whom the check weigher was appointed may have left the mine or others have entered the same since the check weigher's appointment, any rule of law or equity to the contrary notwithstanding."

(2) Ante, p. 208, note.

(3) [1908] 2 K. B. 750.

in *Woodward* v. *Sarsons* (1); and this there cannot be where there has been no opportunity to nominate.

[*Addie & Sons' Collieries* v. *Sullivan* (2) was also referred to.]

Luxmoore K.C. in reply. *Thorpe* v. *Davies* (3) only decided that as one check weigher had already been appointed another one could not be appointed to his detriment. In the present case the plaintiffs had not been appointed at the time of Clark's election.

Cur. adv. vult.

1928. March 23. SALTER J. This is an appeal from the judgment of the learned judge of the Newcastle-on-Tyne County Court, in an action which was brought by the plaintiffs claiming to be the duly appointed check weighmen for a mine known as the Greenside Mine, in Northumberland, and claiming under two statutes to be paid by the defendant, a hewer employed in that mine, a proportion of their wages as check weighmen. The learned judge gave judgment for the plaintiffs; the defendant appeals.

The question is whether upon the proper construction of these two statutes the plaintiffs are entitled to recover. The matters raised are as to the due appointment and the rights to remuneration of check weighmen in coal mines. The statutes are the Coal Mines Regulation Act, 1887, s. 13, sub-s. 1, and s. 14, sub-s. 1, and the Coal Mines (Weighing of Minerals) Act, 1905, s. 1, sub-ss. 2, 3, 5, and s. 3. Check weighmen had been employed in fact for generations, and they had received a statutory recognition in the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 78, s. 18). The Act of 1887 was passed to consolidate and amend that and other Acts, and it is unnecessary to go behind the Act of 1887. Sect. 13, sub-s. 1, of that Act provides: "The persons who are employed in a mine, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as 'a check weigher') at each place appointed for the weighing of the mineral, and at each place

(1) (1875) L. R. 10 C. P. 733, 743.
(2) 1916 S. C. 770.
(3) [1908] 2 K. B. 750.

appointed for determining the deductions, in order that he may on behalf of the persons by whom he is so stationed take a correct account of the weight of the mineral or determine correctly the deductions as the case may be." We were referred to the words "on behalf of the persons by whom he is so stationed." In my view that merely means on behalf of the employees of the mine who are paid by weight, and are, therefore, concerned to have the weight and allowances correctly determined. The power given is to station a person. Nothing is said so far as to the method of appointment, but the object of the section clearly is to give a statutory right to the men's representative, which the employer must respect. Sect. 14, sub-s. 1, entitled "Remuneration of check weigher" provides: "Where a check weigher has been appointed by the majority, ascertained by ballot, of the persons employed in a mine who are paid according to the weight of the mineral gotten by them, and has acted as such, he may recover from any person for the time being employed at such mine and so paid, his proportion of the check weigher's wages or recompense, notwithstanding that any of the persons by whom the check weigher was appointed may have left the mine or others have entered the same since the check weigher's appointment, any rule of law or equity to the contrary notwithstanding." That is plainly a provision which gives a special right to a check weigher who has been appointed by a majority determined by ballot of weight-paid workmen employed in the mine from time to time. Then the Act of 1905 by s. 1, sub-s. 1, gives power to appoint deputy check weighers and then by sub-ss. 2 and 3 makes provision for the proper ascertainment and notice to the employers of the appointment of check weighers by the men. Sect. 1, sub-s. 2, provides: "A statutory declaration, made by the person who presided at a meeting for the purpose of appointing a check weigher or deputy check weigher, to the effect that he presided at that meeting, and that the person named in the declaration was duly appointed check weigher or deputy check weigher, as the case may be, by that meeting, shall be forthwith delivered to the owner, agent, or manager of the mine, and shall be prima facie evidence of that appointment." Then sub-s. 3: "Where the check weigher or deputy check weigher was appointed by a majority, ascertained by ballot, of the persons employed in the mine, and paid according to the mineral gotten, the declaration shall so state, and, if he was not so appointed, then it shall state the names of the persons by whom or on whose behalf the check weigher or deputy check weigher was appointed. Where a check weigher or deputy check weigher is appointed by such a majority as aforesaid, he shall be deemed to be appointed on behalf of all the persons employed in the mine who are entitled to appoint him." It is clear, therefore, that the statutory declaration which must be made by the chairman of the meeting which makes the appointment must state whether or not the person purported to have been appointed was appointed by a majority ascertained by ballot of all the weight-paid employees in the mine. If it were so then it is not necessary to enumerate the persons on whose behalf the check weigher has been appointed, because he is deemed to have been appointed on behalf of all the weight-paid workmen. If he is not appointed by that majority thus ascertained, then the declaration must give the name of every person by whom or on whose behalf he has been appointed. It would seem from those words to follow that the persons by whom he is appointed are not necessarily the same as the persons on whose behalf he is appointed, but happily we are not called upon in this case to go any further into that point. Therefore, there are clearly, if not two classes of check weighers, two methods of appointing a check weigher, and according to the class to which they belong, or, perhaps, to the method of appointment, their rights are widely different. By s. 1, sub-s. 5, of the Act of 1905: "When a check weigher or deputy check weigher is appointed by a majority, ascertained by ballot, of the persons employed in the mine, and paid according to the mineral gotten, he shall not be removed by the persons employed in the mine except by a majority, ascertained by ballot, of the persons employed and paid as aforesaid at the time of the removal." There are other methods of removing a check weigher, not by the persons employed in the mine (1); but where it is a question of removing him by the persons employed in the mine, if he is a check weigher appointed by a majority ascertained by ballot, he is not to be removed except by a majority ascertained by ballot, and that is a majority of all the people thus employed and paid at the time of the removal. Just as he is entitled to be paid by persons who were not in the mine at all when he was appointed, so he can be removed by persons who were not in the mine at all at that time. By s. 3 of the Act of 1905: "All persons who are entitled, by the principal Act or this Act, to appoint a check weigher or deputy check weigher shall have due notice given to them of the intention to appoint a check weigher or deputy check weigher, by a notice, posted at the pithead or otherwise, specifying the time and place of the meeting, and have the same facilities given to each of them for the purpose of recording their votes, either by ballot or otherwise, in such appointment."

Those are the sections and sub-sections which we have to consider. They were considered in a Scottish case of *Addie & Sons' Collieries* v. *Sullivan* (2), which was concerned with the appointment of time keepers in mines. It is only necessary to refer to a few words in the judgment of the Lord President: "The procedure to be followed in the appointment of a time checker is by statute declared to be the same as the procedure to be followed in the appointment of a check weigher. No express statutory procedure is enjoined. It is very easy to infer from the provisions of s. 1, sub-ss. 2 and 3, of the Coal Mines (Weighing of Minerals) Act, 1905, what the essential steps must be. There must be a meeting of those entitled to appoint, at which the appointment is made. Of that meeting due notice must be given to all those who are entitled to make the appointment. The appointment may be made by the persons present at the meeting, whose names must subsequently be given, or it may be made by a majority of those in the mine entitled to appoint, that majority to be ascertained by ballot. When the appointment at a meeting has been made the person who presided at the meeting must forthwith deliver to the mine owners a statutory declaration to the effect that he presided at the meeting at which the person named was appointed time checker. If the appointment was made by majority, the statutory declaration must so say. If it was made by the persons present, the names of those persons must be given. And I ought to add that, when a ballot is taken, equal facilities for recording their votes must be given to all those entitled to vote." Speaking with great respect, it may perhaps be that certain qualifications and additions have to be made to that passage if it is to be quite complete, but it is, I think, a very valuable outline of the practice with regard to the appointment of check weighers in mines. It is plain that there must be a meeting. At that meeting the appointment may take place, or it may not. There may afterwards be a ballot. If a check weigher is appointed at the meeting in the absence of ballot it is plain that he cannot be what I will call a majority check weigher, because, quite apart from the numbers voting for him, the majority has not been ascertained by ballot, and therefore he cannot be a majority check weigher. If a ballot follows the meeting the result may be to appoint a majority check weigher. That will depend on the result of the ballot, or the result may be to appoint what I will call, for convenience, a minority check weigher, as in this case, Clark. Clark was not a majority check weigher, but he was appointed as the result of a ballot. In order, therefore, to appoint a majority check weigher there must be first of all a meeting of which due notice must be given, and at which nomination for the ballot must be made. Then there must be after that a ballot, and that ballot must show a sufficient majority of the persons entitled to appoint. A majority check weigher and a minority check weigher have both a status under the statutes. In each case their appointment must be notified to the employers, who must recognize it. The majority check weigher has certain important rights which are not enjoyed by a minority check weigher. He is deemed to represent all the weight-paid workers in the mine. He has a right to payment from them, and by agreement the employers may deduct his wages from the wages of the weight-paid men. (1) That, I think, is a summary of the effect of these sections.

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(1) E.g., under s. 13, sub-ss. 4 and 5, of the Act of 1887.

(2) 1916 S. C. 770, 773.

Now I come to the facts of this case. This mine had been idle during the coal strike. That strike ended on December 1, 1926, and work was gradually recommenced at the mine. On December 10 the following notice was exhibited at the pithead of the intention to appoint a check weighman. "Greenside All-Grades' Union. Mr. Matthew Golightly and Mr. M. R. Clark are the two nominations for check weighman. The ballot will take place in the Shelter on Saturday next, December 18, 1926, between the hours of 11 A.M. and 12.30 P.M. C. Forster, Secretary." The men working at the mine had belonged, before the strike, to the Durham Miners' Union, and after the strike, when the men began to go back to work—there was some difference of opinion between them as to whether work should be resumed or not, and on what terms, and so forth—a union was formed called the Greenside All-Grades' Union, of which Mr. Forster was secretary. On December 18, in pursuance of this notice, a ballot took place: 84 persons balloted for Clark. At that time there were 217 weight paid workers in the mine, and therefore Clark's appointment was not an appointment by a majority. On December 30 a statutory declaration was made by Mr. John Robson, who had presided. He said: "A meeting of the persons who are entitled to appoint a check weigher and employed at the Greenside Colliery in the county of Durham owned by the Stella Coal Company, Ld., was called by a notice posted at the pithead," and then follows the notice. Then: "I was present at and presiding at a meeting held on the said December 18, 1926, at 12.30 afternoon in the Pit Shelter when Matthew Richardson Clark of 9 Meldon Terrace, Greenside, aforesaid, was appointed check weigher on behalf of the workmen who were members of the Greenside Colliery All-Grades' Union." Then para. 3:

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(1) Under s. 14, sub-s. 2, of the Act of 1887.

"The names and addresses of the persons by whom or on whose behalf the said Matthew Richardson Clark was appointed check weigher are set out in the list hereunto annexed and marked 'A.'" Then follows a list of 84 names, of which the defendant's is one. Therefore there was a statutory declaration in accordance with the statute regarding the appointment by ballot of a check weighman, who was not a majority check weighman. Clark went into the cabin and began work on January 3, 1927. The cabin was occupied at that time by the two plaintiffs as a matter of convenience. They had been the check weighmen of the mine, I think, for years before the strike. When the strike ended they went back into the cabin by force of habit, but it is common ground that they had no legal right there. The strike had determined their appointment, and they had not been reappointed. On January 3 a notice was posted headed: "Weigh Fund Meeting," calling a meeting to get nominations for the post of check weighman for January 5. The weigh fund is a fund which is not connected with any particular union, but through which the check weighman is paid his wages. On January 5 accordingly the meeting took place, and the two plaintiffs were nominated. On the 7th the ballot was held. There were 264 at that time entitled to appoint, and 176 voted for the plaintiffs; therefore the plaintiffs were appointed by a majority of those entitled to appoint. On January 10 the statutory declaration was made. The plaintiffs, therefore, if that appointment was correct in form, were appointed on January 7 majority check weighman and deputy. There was another ballot on February 7 with a similar result, as there was some doubt as to the regularity of the previous ballot. On February 7, and afterwards, one or other of the plaintiffs, whichever one was on duty, was in the cabin, and Clark was also in the cabin. They were both there checking the weighing by the employers' agents on behalf of the men or some of the men. On February 2 a notice was given of a meeting in reference to the election of Clark, and a ballot took place on February 5. The ballot paper is headed: "All hewers and fillers are entitled to vote. Are you in favour of M. R. Clark representing you as a check weighman? Yes. No. Put your cross in space beside the word you wish to vote for." The result of that ballot was that 63 voted for Clark remaining and 186 voted for his not remaining. There were at that time 350 weight-paid men in the mine. The plaintiffs' claim against the defendant begins on February 7, and they claim to be paid a sum, as to which there is no question, which would be payable to them if they are entitled to recover. The essential facts of this case are that there was a purported appointment of Clark, and, subsequently, a purported appointment of the plaintiffs. In the view I take of this case it is not necessary to consider what was the legal effect, if any, of the ballot which was held about Clark on February 5. The statute contains no provision for the determination of the appointment of a minority check weighman. The meeting of February 5 was no doubt held in view of the provision that a majority check weighman cannot be got rid of except by ballot. But Clark never was a majority check weighman, and my present impression is that that ballot had no legal effect.

The plaintiffs claim under s. 14, sub-s. 1, of the Act of 1887. [His Lordship read it. (1)] The defendant was a person for the time being employed, and therefore, prima facie, the plaintiffs are entitled to recover if they are duly appointed majority check weighmen. If so appointed they are entitled to be paid by all (s. 14, sub-s. 1, of the Act of 1887) and are deemed to represent all (s. 1, sub-s. 3, of the Act of 1905). It is said that the plaintiffs were not entitled to payment because the existence of Clark, with a following of 84 miners, who had desired that he should represent them and had appointed him for that purpose, deprives the plaintiffs of their right to a contribution from any of the persons who had appointed Clark; and it is said further, apart from that point, that it is necessary, to entitle these check weighmen to recover under this section, that they should have acted as such. That is clearly so. It is said that they did not act as such, because they refused to recognize or to check

(1) Ante, p. 209, note.

the weights, where tubs came up to be weighed, which had been got by members of the Greenside All-Grades' Union. I do not think we can deal with this appeal on the footing that the defendant has succeeded in showing any misconduct or non-performance of duty on the part of either of the plaintiffs, which would enable him to resist this claim as against either of them. I wish to say this most emphatically, that the majority check weighman, in order to entitle him to these contributions, must of course act fairly for all the miners, quite apart from what union they may belong to, whose interests he is charged to represent. He is deemed by law to be appointed on behalf of all of them, and all their rights are in his hands. If it could be shown that he had failed to act fairly, or had refused to act at all, in the case of any wage paid servant, he would certainly not be entitled to contribution from that man, and in my judgment he would not be entitled to any payment at all, because it would be a fundamental breach of his duty.

The defendant says: "I am not liable to pay the plaintiffs because I paid Clark; Clark was duly appointed to represent me, and therefore I am not liable to pay the plaintiffs." I am not able to agree with either proposition. I have come to the conclusion that Clark's due appointment was not proved, first, because I think the notice does not comply with s. 3 of the Act of 1905, which enacts that "all persons" entitled to appoint shall have notice. I think that the notice of December 10 did not give proper notice to all the persons entitled to appoint of the intention to appoint a check weighman. It was addressed to the Greenside All-Grades' Union. It was signed by the secretary of that union, and the evidence was that the ballot was attended only by members of that union. The chairman's statutory declaration says that Clark had been appointed on behalf of the 84 men named, who were members of the All-Grades' Union. I have come to the conclusion that on that ground it was not a proper notice. There is also a further ground, for I think that the right to nominate is essential to an election by ballot. The election of a check weighman is not necessarily by ballot. It involves clearly, first of all, a meeting at which election may take place, or, if not, then nomination will take place, and after that a ballot. In this case there is no evidence that any opportunity was given to any one to take part in the nomination of Mr. Golightly and Mr. Clark. The notice states that they had already been nominated, and that all that remains to do is to choose which of those two shall be check weighman. I think, therefore, that the election of Mr. Clark was invalid on both grounds.

Then it is said that if he was duly elected his appointment is avoided by the subsequent appointment of the plaintiffs. That raises the question whether it is possible under this machinery to have two check weighmen or more in the cabin at the same time representing different groups of workmen; and in this case, whether it is possible to have what I have called a majority check weighman, who is deemed to represent them all, and one or more other check weighmen representing particular groups of workmen. It is not necessary to decide that question in view of the last point which I have to mention, but as this may be a point of some importance I will express my own present opinion about it. By s. 1, sub-s. 3, of the Act of 1905 (1), the duly appointed majority check weighman is deemed to have been appointed on behalf of all the men, that is to say, on behalf of all the weight-paid men in the mine at that time, and he is there on behalf of all the weight-paid men at any time from time to time in the mine. It is therefore quite clear that he is to be deemed by all persons for all purposes to represent every weight-paid man, and these plaintiffs are deemed to represent the defendant and are bound to protect his interests. I ask myself whether the statute does provide for such a thing as two check weighmen representing the men in the cabin at the same time. The check weighmen are concerned with the weight, and they are concerned with the allowance for stones, and so forth. Supposing one of the plaintiffs and Clark to be in the cabin at the same time and a truck comes forward which has been won by one of the 84 men who have appointed Clark,

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(1) Ante, p. 208, note.

I am perfectly clear that the plaintiff must do his duty with regard to that truck; he represents that miner, whatever his name may be; he must deal with it. It is said that Clark must deal with it too. Supposing a question arises as to the allowance for stones; the owners' representative says what allowance he thinks fair, and the plaintiff majority check weighman agrees, but Clark does not agree. What is to happen then? What are the owners to do? The man who by law is deemed to represent the particular hewer agrees. Another man, whom that hewer has specially appointed, does not agree. It appears to me that a practical question of great difficulty would arise. My general impression is that this Act does not contemplate the existence of a minority check weighman alongside a majority check weighman, and that the due appointment of the plaintiffs cancelled and put an end to the appointment of Clark, even if that appointment had been originally valid. It is not, however, necessary to decide this point, because I am quite clear that even if Clark had been duly appointed and if he had remained the duly appointed representative of the 84 miners, that would not have afforded any defence against this claim. The words of s. 14, sub-s. 1, of the earlier Act are, to my mind, perfectly clear. It is impossible to read into it some such words as these: He shall be entitled to a contribution from every workman unless such workman shall be specially represented by some other check weighman, or words of that sort. I think that the existence of a minority check weighman, even if it were possible, is not a defence to this claim.

For these reasons I think the learned judge arrived at the right conclusion, and this appeal must be dismissed.

CHARLES J. I agree, and I desire to add very few words. In my view the appointment of Clark was invalid, inasmuch as the notice was a bad notice, and because no opportunity was given for nomination. I further think that had his appointment been valid his manner of removal was invalid. If one assumes that Clark's appointment was valid and assumes as well that Clark's removal was invalid, still there would be, in my judgment, no defence to the plaintiffs' claim. Once it is admitted and proved that the plaintiffs were properly appointed by a majority on a ballot they are deemed by law to represent all the weight-paid wage earners in the mine, and they are, as such representatives, entitled by s. 14, sub-s. 1, of the Coal Mines Regulation Act, 1887, to have their wages paid by contributions from each and every of those wage earners in the mine. I agree in doubting whether the co-existence of minority and majority check weighmen is possible.

Appeal dismissed.

Solicitors for appellant: *King, Wigg & Brightman, for F. J. Lambert, Gateshead.*

Solicitors for respondents: *Hyman Isaacs, Lewis & Mills, for Patrick Bennett & Maddison, Newcastle-on-Tyne.*

W. L. L. B.

PIPER AND ANOTHER *v.* ST. MARYLEBONE LICENSING JUSTICES.

1928
April 2, 3.

Licensing—Special Removal of Licence—Refusal of licensing Justices—Appeal to Quarter Sessions—Power of Quarter Sessions to state Case—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *and* 1 *Geo.* 5, *c.* 24), *s.* 29, *sub-ss.* 1, 5—*Supreme Court of Judicature (Consolidation) Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 25, *sub-s.* 1.

Where, under s. 29, sub-s. 1, of the Licensing (Consolidation) Act, 1910, there is an appeal to quarter sessions against the refusal of licensing justices to grant a renewal, transfer or special removal of a justices' licence, the judgment of quarter sessions, by sub-s. 5 of s. 29, is final, and no appeal from it lies to the High Court by way of case stated.

CASE stated by quarter sessions.

In 1925 the Metropolitan Railway Company, which had constructed and worked the material parts of the Underground Inner Circle Railway under the Metropolitan Railway Act, 1854 (17 & 18 Vict. c. ccxxi.), began to reconstruct the

Edgware Road Station of that railway to meet an increasing public demand for travelling facilities. Before the reconstruction the station had consisted at rail level of two platforms served by an up road and a down road. For many years before as well as after the year 1904 and up to November, 1925, two refreshment rooms, one on the up platform and one on the down platform, had been fully licensed for the sale of intoxicating liquors. Since 1883 Spiers & Pond, Ld., had been the tenants of these refreshment rooms, one, Amos Piper, their general manager, being the licensee at all material times.

The reconstruction operations necessitated at once the entire demolition of the refreshment room on the then existing down platform. Amos Piper applied to the St. Marylebone licensing justices on November 9, 1925, for permission to alter the refreshment rooms by removing the refreshment room on the down platform and enlarging the refreshment room on the up platform. That application was granted.

In October, 1927, the railway company, to complete their reconstruction, were about to pull down the remaining old licensed refreshment room. On October 10, 1927, Amos Piper applied under s. 24, sub-s. 2 (*a*), of the Licensing (Consolidation) Act, 1910, at a special licensing sessions, to the licensing justices for the special removal of the justices' licence from the old refreshment room to new refreshment rooms which had been constructed within the station buildings, on the ground that the existing licensed premises were about to be pulled down under an Act for a public purpose. The licensing justices refused the application, and Amos Piper and the railway company appealed to quarter sessions.

The appeals were heard on November 11, 1927. Quarter sessions were of opinion that the existing refreshment room was being pulled down under an Act for a public purpose within the meaning of s. 24, sub-s. 2 (*a*), of the Licensing (Consolidation) Act, 1910, and further determined that the new premises were fit and convenient premises. The Court

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accordingly allowed the appeal and made an order for the special removal of the licence.

The licensing justices being dissatisfied with this determination as being erroneous in point of law, applied that quarter sessions should state a case setting forth the facts and the grounds of their determination that the justices might take the opinion thereon of the King's Bench Division. Quarter sessions were of opinion that they were empowered to state a case on a matter of law for the opinion of the High Court in licensing matters, and that the stating of such a case was in accordance with a long course of practice and precedent. They accordingly stated the present case.

du Parcq K.C. and *Sidney Lamb* for the railway company. As a preliminary point it is submitted that by s. 29, sub-ss. 1 and 5, of the Licensing (Consolidation) Act, 1910 (1), read in conjunction with s. 25, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), the decision of quarter sessions was final, and no appeal by way of case stated lies from it. In *Jones* v. *Hatherton* (2) this point was not decided by the Court of Appeal, but in *Kydd* v. *Liverpool Watch Committee* (3) it was held that the Divisional Court had no jurisdiction to hear an appeal by case stated from an order of quarter sessions made on an appeal against the refusal of a police pension, s. 11 of the Police Act, 1890, providing that the order of quarter sessions on such a matter "shall be final." Two years after that decision Parliament re-enacted, without modification, in s. 29, sub-s. 5, of the Licensing (Consolidation) Act, 1910, the more comprehensive words "final and conclusive for all intents and purposes," which had originally appeared in s. 27 of the Alehouse Act, 1828 (9 Geo. 4, c. 61). A practice, however long-standing, by which quarter sessions have stated cases on which the Court has given decisions may be reviewed by the Court if the matter is free from decision and is one, not of mere procedure, but of statutory right: per Viscount Cave L.C. in *Donald Campbell & Co.* v. *Pollak* (1): see also *Kydd* v. *Liverpool Watch Committee.* (2)

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(1) By the Licensing (Consolidation) Act, 1910, s. 29: "(1.) Any person who thinks himself aggrieved by the refusal of the licensing justices of any licensing district to grant a renewal, transfer, or special removal of a justices' licence, in cases where the power of refusal is vested in those justices, may appeal against the refusal to the Court of Quarter Sessions for the county in which the premises in respect of which the appeal is made are locally situated. . . . ."

(5.) "The judgment of the Court of Quarter Sessions shall be final and conclusive for all intents and purposes."

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 25: (1.) "Every case stated by a Court of Quarter Sessions otherwise than under the Crown Cases Act, 1848, or the Quarter Sessions Act, 1849, for the consideration of the High Court shall be deemed to be an appeal, and shall be heard and determined accordingly."

(2) [1917] 2 K. B. 412.

(3) [1908] A. C. 327.

[He also referred to *Van Laun & Co.* v. *Baring Brothers & Co.* (3) and *Westminster Corporation* v. *Gordon Hotels, Ld.* (4)]

Christmas Humphreys for Amos Piper.

Mitchell Banks K.C. and *Harold Murphy* for the licensing justices. Admittedly a practice, however long-established, may be reviewed if the Court considers that it is contrary to a statute, but the Court will be reluctant to interfere with a practice of very long-standing, which has much to recommend it. It is important to remember that the Licensing (Consolidation) Act, 1910, is a consolidating statute and, therefore, that it is justifiable to assume that Parliament was not so particular to see whether any section of it interfered with an old practice or was consistent with any recent decision, as it would have been if it had been dealing with an Act designed to deal with some entirely new question. The words of s. 29, sub-s. 5, of the Act of 1910 merely kept alive s. 27 of the Alehouse Act, 1828, and ever since 1828 the practice of quarter sessions stating cases for the opinion of the Court on such matters as the present has been recognized and has never been interfered with. It must also be remembered that Lord Loreburn L.C. limited the decision in *Kydd* v. *Liverpool Watch Committee* (5) to the language of the section which was there under consideration. In *Kydd* v. *Liverpool Watch Committee* (6) in the Court of Appeal Fletcher

(1) [1927] A. C. 732, 811.
(2) [1908] A. C. 327.
(3) [1903] 2 K. B. 277.
(4) [1908] A. C. 142.
(5) [1908] A. C. 331.
(6) [1907] 2 K. B. 591, 604.

1928

PIPER
v.
ST. MARYLEBONE LICENSING JUSTICES.

Moulton L.J. explained that *Westminster Corporation* v. *Gordon Hotels, Ld.* (1) did not affect the procedure relating to cases stated by quarter sessions, while in *Wills & Sons* v. *McSherry* (2) Channell J. expressed his reluctance to accept the view that s. 164 of the Merchant Shipping Act, 1894, precluded a court of summary jurisdiction from stating a case on the matters there dealt with.

LORD HEWART C.J. The question raised in this case is whether, when s. 29, sub-s. 5, of the Licensing (Consolidation) Act, 1910, provides that "the judgment of the Court of Quarter Sessions shall be final and conclusive for all intents and purposes," that Court has, nevertheless, power to state a special case for the opinion of the King's Bench Division. In my opinion that question is concluded by the decision of the House of Lords in *Kydd* v. *Liverpool Watch Committee.* (3) That case turned on the construction of s. 11 of the Police Act, 1890, which provides for an appeal against the forfeiture or refusal of a police pension or allowance to quarter sessions, who "may make such order in the matter as appears to the Court just, which order shall be final." The question for decision was whether that provision regarding the finality of the decision of quarter sessions prevented them from stating a special case for the opinion of this Court. The House of Lords unanimously decided that it did. Lord Loreburn L.C., referring to the language of the section there under consideration, said (4): "Where it says, speaking of such an order, that it is to be final, I think it means there is to be an end of the business at Quarter Sessions, and I am fortified in the view I take by knowing that the same view commended itself to the majority of the Court of Appeal (5), had they felt themselves free from precedents." The judgment of Lord Loreburn was concurred in by Lord Halsbury and by Lord Ashbourne. The words in s. 11 of the Police Act, 1890, which was there under consideration were "shall be final."

(1) [1908] A. C. 142.
(2) [1914] 1 K. B. 616, 621.
(3) [1908] A. C. 327.
(4) [1908] A. C. 331.
(5) [1907] 2 K. B. 591.

The words in s. 29, sub-s. 5, of the Licensing (Consolidation) Act, 1910, are "shall be final and conclusive for all intents and purposes." The additional words do not qualify or weaken the word "final." In these circumstances, whatever the practice may hitherto have been, it seems to me clear that quarter sessions had no power to state this special case. That such a case, if stated, would be an appeal is made clear by s. 25, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925. This appeal, I think, therefore, must be dismissed.

AVORY J. I am of the same opinion, and I have nothing to add.

ACTON J. I agree.

Preliminary point upheld; appeal dismissed.

Solicitor for railway company: *I. Buchanan Pritchard.*
Solicitors for Amos Piper: *White & Leonard.*
Solicitors for licensing justices: *Greenwell & Co.*

G. F. L. B.

WILLIAMS (Appellant) *v.* JONES (Respondent).

1928
April 3.

Alien—Registration—British Subjects Visitors at Hotel—Hotel Keeper—Duty of, to require all Visitors to sign Statement as to Nationality—Duty of all Visitors to sign such Statement—Aliens Order, 1920 (*St. R. & O.*, 1920, *No.* 448), *art.* 7.

The Aliens Order, 1920, by art. 7, para. 3, imposes an obligation upon every person, whether an alien or not, staying at any premises to which the article applies to sign, when so required, a statement as to his nationality, and if an alien to furnish the further particulars required by the article. It also imposes an obligation upon the keeper of any such premises to require any person who stays at the premises to sign the statement and furnish the particulars. The fact that the keeper of any such premises knows that a person staying at such premises is a British subject does not excuse compliance with the obligation to require such person to sign the statement as to his nationality.

Case stated by justices for the county of Brecon.

An information was preferred at a court of summary jurisdiction at Llanwrtyd Wells by the appellant, William Williams, police superintendent and deputy chief constable for the county of Brecon, under the Aliens Order, 1920 (1), against the respondent, Thomas Sidney Jones, of the Belle Vue Hotel, Llanwrtyd Wells, for having on August 14, 1927, he being the keeper of certain premises to which the Aliens

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(1) The Aliens Order, 1920, art. 7 (1.): "It shall be the duty of the keeper of any premises to which this article applies to keep a register of all persons staying at the premises who are aliens not being under the age of sixteen years.

"The keeper of any such premises shall, on the arrival of any such alien at the premises, ascertain and enter or cause to be entered in the register kept for the purpose the name and nationality of such alien, together with the date of his arrival and the address from which he last came; and on the departure of any such alien the keeper of the premises shall enter or cause to be entered in the register the date of departure and destination on departure of the alien, and if required by the Secretary of State he shall also ascertain and enter in the register from time to time such other particulars as to the alien as the Secretary of State may direct.

. . . . . .

(3.) "It shall be the duty—

(*a*) of every person (whether an alien or not) staying at any premises to which this article applies to sign, when so required, a statement as to his nationality and, if an alien, to furnish and sign a statement of the particulars required under this article;

(*b*) of the keeper of any premises to which this article applies to require any person who stays at the premises to sign the statement and furnish the particulars required from him under this article. . . ."

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Order, 1920, applied, to wit, the Belle Vue Hotel, unlawfully failed to require persons staying at the said hotel to sign a statement and furnish the particulars required from them under art. 7 of the said Order.

At the hearing of the information on September 8, 1927, the following facts were admitted or proved :—

(1.) On August 14, 1927, there were persons staying at the said hotel.

(2.) Such persons were not aliens, but British subjects.

(3.) The respondent had not required such persons to sign a statement and furnish the particulars referred to in the information.

(4.) The appellant had been furnished with the names and addresses of the British subjects, together with the numbers of the bedrooms which they occupied in the said hotel.

It was contended on behalf of the respondent : (i.) That the Aliens Order, 1920 (1), and in particular art. 7 thereof in its entirety must be considered in order to arrive at the legal construction of para. 3 (*a*) and (*b*) ; (ii.) that the respondent was not under any legal obligation to require persons staying at his hotel, who were known to be British subjects, to sign the statement and furnish the particulars referred to in art. 7 of the said Order.

The justices were of opinion that the said Order was part of the emergency legislation, and that the respondent's contention was correct, and that the respondent was not under any legal obligation to require British subjects staying at his hotel, who were known to him as British subjects, to sign the statement and furnish the particulars referred to in art. 7 of the said Order. They accordingly dismissed the information.

The question for the opinion of the Court was whether the justices on the above determination of facts came to a correct determination and decision in point of law.

Richard O'Sullivan for the appellant. The Aliens Order, 1920, by art. 7, para. (3.) (*b*), imposes a duty upon the keeper of any hotel or other premises to which the article applies to require any person who stays at the hotel, whether he is a British subject or an alien, to sign a statement as to his nationality, and, if he is an alien, to furnish the further particulars required from him under the article. The respondent's contention that he is not under that duty is quite wrong. Under art. 7, para. (3.) (*a*), of the Order a duty is imposed upon every person staying at the hotel or other premises to which the article applies to sign, when so required, a statement as to his nationality. That duty is imposed upon every visitor whether he is a British subject or an alien. If he is an alien he is also under a duty to furnish the further particulars required by the article. The duty upon the visitors to sign the statement as to nationality only arises when they are required to sign the statement, hence the importance of the duty imposed upon the hotel keeper to require every visitor to sign the statement as to his nationality.

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(1) Ante, p. 227, note.

Cremlyn for the respondent. The Aliens Order, 1920, ought to be construed strictly, as it was made under the old Defence of the Realm Regulations and was only intended to protect the country against aliens. The offence disclosed in the information is failure to require persons staying at the hotel to sign a statement and furnish the particulars required from them under art. 7 of the Order. But only aliens can be required to sign the particulars required by art. 7 of the Order, and the persons staying at the hotel were British subjects and not aliens. There is no obligation imposed by the Order upon hotel keepers to require a visitor who is well known as a British subject to sign the statement as to his nationality. A person who is a British subject is not required to sign a statement that he is a British subject when it is known that he is a British subject. A visitor is only required to sign a statement as to his nationality when his nationality is not known. The words "any persons" in para. (3.) (*b*) of art. 7 mean some persons—namely, those persons whose nationality is not known to the hotel keeper. There is nothing in the Order which specifies the time when a British subject is to sign the statement as to nationality, whereas an alien is required to sign the statement as to nationality on arrival at the hotel and the hotel keeper is bound on the arrival of an alien to enter his name and nationality in the register kept for that purpose. The words "when so required" in para. (3.) (*a*) of art. 7 mean when it is necessary to do so.

LORD HEWART C.J. This is a case stated by justices, and the question which is raised arises under an information preferred by the appellant under the Aliens Order, 1920, against the respondent for that he being the keeper of certain premises to which the Aliens Order, 1920, applies, unlawfully failed to require persons staying at the hotel to do what the Order says they must be required to do. The justices, having heard the information, dismissed it, and the question for this Court is whether in so doing they came to a correct determination in point of law.

The facts are in a very short compass. There were on August 14, 1927, certain persons staying at the respondent's hotel; in fact, those persons were not aliens, but were British subjects, and in fact the respondent had not required those persons to sign the statement or furnish the particulars referred to in the information. It is quite clear from the statement of the respondent's contentions and the opinion of the justices that the only case made for the defence was that "the respondent was not under any legal obligation to require persons staying at his hotel, who were known to be British subjects, to sign the statement and furnish the particulars referred to in art. 7 of the said Order." So the respondent contended and so the justices held. They say: "We were of opinion that the respondent's contention was correct, and that the respondent was not under any legal obligation to require British subjects staying at his hotel, who were known to him as British subjects, to sign the statement and furnish the particulars referred to in art. 7 of the said Order." In some case perhaps the point will be taken that the keeper of the hotel has not had a reasonable time in which to perform his duty or opportunity of requiring the signatures referred to in the article. No such case was made here, and any allegation of that kind is quite inconsistent with the case which was made—namely, that the respondent was not under any legal obligation to require his guests to sign the register.

The question therefore turns upon the construction of the Aliens Order, 1920. I do not think that we are concerned with the merits of the Order or the merits of continuing the Order or the merits of the drafting of the Order. It may well be, especially when one comes to para. (3.) of art. 7 of the Order, that a slight additional clearness would have been gained if the two matters dealt with in that paragraph had been dealt with the other way round. Para. (3.) (*a*) of art. 7 provides as follows: "It shall be the duty of every person (whether an alien or not) staying at any premises to which this article applies to sign, when so required, a statement as to his nationality and, if an alien, to furnish and sign a statement of the particulars required under this article." There are two quite separate things contemplated in that paragraph: (1.) which is universal in its application, that every person, whether an alien or not, staying at any premises to which the article applies must, when so required, sign a statement as to his nationality, and (2.) having so signed, if he is an alien, he must, when so required, furnish and sign a statement of the particulars which are described in the article. The meaning, one would have thought, is sufficiently clear. Every person, whether an alien or not, must sign a statement as to his nationality; once that statement is signed the information, true or false, is given, and if it appears from that information that he is an alien the keeper of the house is in a position to proceed to the second duty imposed by para. 3 of art. 7, which is to require the alien to sign a statement of the particulars that an alien has to furnish. As rendering those steps and each of them possible, the article goes on to provide in para. (3.) (*b*) that "it shall be the duty of the keeper of any premises to which this article applies to require any person who stays at the premises to sign the statement and furnish the particulars required from him under this article," and also to preserve such statements. It seems to me that these words are to be read singula singulis reddendo with what is contained in para. (*a*). The statement is a statement as to his nationality, the particulars are the particulars required of him if it appears that he is an alien, and it is the duty of the keeper of any premises to which the article applies to require any person who stays at his premises to sign the statement as to his nationality. When he has signed the statement, if it appears that he is not of British nationality, then it is the duty of the keeper of the premises to require him to furnish the further particulars required by the article.

Now the argument which was made in the Court below, and also in this Court, on behalf of the respondent was that "the respondent was not under any legal obligation to require persons staying at his hotel, who were known to be British subjects, to sign the statement." How can the keeper of premises to which the article applies know whether the persons staying in the hotel are British subjects ? The article does not rest upon his knowledge or supposed knowledge ; it requires a document to be filled up, and if that document is falsely filled up by the person filling it up certain unpleasant consequences follow. But in order that the machinery of the article may work it is necessary that every person should sign that statement as to nationality. To exempt persons who are known to the landlord to be British subjects from the obligation of signing the statement as to nationality—that is to say to exempt persons who the landlord thinks are British subjects—might, of course, reduce the whole machinery of the article to nothing. At any rate, if that is what the article meant it is not what the article has expressed. Mr. Cremlyn has been driven to contend that the words "it shall be the duty of the keeper of any premises to which this article applies to require any person who stays at the premises to sign the statement" really mean that it shall be the duty of the keeper of the premises to require some persons who stay at the premises to sign the statement, such persons being persons as to whose nationality he has a doubt. But that is not what the article provides.

I think therefore that this appeal succeeds, and that the case ought to go back to the justices with this expression of opinion as to the true construction of the article.

AVORY J. I have entertained some doubt about this case in consequence of the form in which this information was laid against the appellant. It charged that "he did unlawfully fail to require persons staying at the said hotel to sign a statement and furnish the particulars required from them under art. 7 of the Order," and the contention which was put before the justices was that "the respondent was not under any legal obligation to require persons staying at his hotel, who were known to be British subjects, to sign the statement and furnish the particulars referred to in art. 7." I think that the justices in this case have probably been misled by the combination in the information and in the argument of the two matters—namely, the statement as to nationality and the particulars which have to be furnished by an alien, for it is to be observed that a British subject is under no obligation to furnish the particulars which are there mentioned, and it may very well be that the justices in looking at the matter as it was combined in the information and argument were misled into thinking that there was no obligation on the keeper of the house to require a British subject to make a statement as to his nationality. I do not differ from the judgment of the Lord Chief Justice as to the strict reading of para. (3.) of art. 7 of the Aliens Order, 1920, which in terms makes it the duty of the keeper of an hotel to require "any person"—and I cannot doubt that that includes a British subject—who stays at the hotel to sign a statement as to his nationality. If the information had stopped there and had charged the respondent with having failed to require persons staying at his hotel to sign a statement as to their nationality, I am not satisfied that the justices would have fallen into the error which they did.

I desire to reserve the question whether it is the duty of the keeper of an hotel in a case where persons arriving at the hotel are known to him to be British subjects, to make his requisition upon them on their arrival, or whether he may not do it at some time subsequent to their arrival. I agree that the case should be remitted.

ACTON J. I agree, without any doubt or qualification whatever, with the judgment that has been delivered by the Lord Chief Justice.

Appeal allowed.

Solicitors for appellant: *Field, Roscoe & Co., for A. Jolly, Brecon.*

Solicitors for respondent: *Samuel Griffith & Son, Llanwrtyd Wells.*

R. F. S.

1928
April 3.

ROBINSONS, LIMITED (APPELLANTS) *v.* RICHARDS (RESPONDENT).

Motor Car—Trailer—Brakes—Brake of Trailer applied by Driver of Motor Car—Inability of Driver to apply both Brakes of Motor Car and the Brake of Trailer at the same Time without losing Control of steering Wheel—Necessity for second Man to work Brake of Trailer—Locomotives on Highways Act, 1896 (59 *&* 60 *Vict. c.* 36), *ss.* 6, 7—*Motor Cars* (*Use and Construction*) *Order,* 1904 (*St. R. & O.,* 1904, *No.* 315), *articles II.* (4.), *III.* (3.)—*Heavy Motor Car Order,* 1904 (*St. R. & O.,* 1904, *No.* 1809), *art. XVI.*

The Motor Cars (Use and Construction) Order, 1904, provides by art. III. that "No person shall cause or permit a motor car to be used on any highway for the purpose of drawing any vehicle, ... unless the conditions hereinafter set forth are satisfied—namely. . . . "(3.) The vehicle drawn by a motor car shall, when in pursuance of" condition 2 "a brake is required to be attached thereto, carry upon the vehicle a person competent to apply efficiently the brake: Provided that it shall not be necessary to comply with this condition . . . . if the brake of the vehicle drawn can be applied from the motor car by a person upon the motor car independently of the brakes of the latter."

A tractor belonging to the appellants, which was drawing a trailer along the highway, had two brakes, a hand brake and a foot brake, which could be operated by the driver simultaneously without losing control of the steering wheel. The trailer was fitted with a brake which was not in any way connected with the brakes of the tractor, but which could be operated by a person occupying the driving seat of the tractor, independently of the brakes of the latter, by a special handle, but no person other than the driver of the tractor was employed anywhere upon either vehicle to operate the brake of the trailer. The driver of the tractor could, without leaving hold of the steering wheel, apply simultaneously the hand brake of the trailer and the foot brake of the tractor, but he could not apply simultaneously the hand brake of the tractor and the hand brake of the trailer without losing control of the steering wheel:—

Held, that the appellants had contravened the provisions of art. III. (3.) of the Motor Cars (Use and Construction) Order, 1904, because no person competent to apply the trailer brake efficiently was carried upon either the tractor or the trailer.

CASE stated by the stipendiary magistrate for the Staffordshire Potteries.

An information was preferred by the respondent, Alfred James Richards, chief superintendent of police in the county of Stafford, under s. 7 of the Locomotives on Highways Act, 1896, against the appellants, Robinsons, Ld., of Salford, for having on September 22, 1927, unlawfully caused to be used on a highway a certain heavy motor lorry, which was then drawing another vehicle, to wit, a trailer, in contravention of the provisions of art. III. of the Motor Cars (Use and Construction) Order, 1904, and art. XVI. of the Heavy Motor Car Order, 1904, in that, although the brake required by the first named Order to be fitted to the trailer could be applied from the motor lorry drawing the same (independently of the brakes of the latter), no person competent to apply such trailer brake efficiently was upon either the motor lorry or trailer.

Upon the hearing of the information on November 4, 1927, the following facts were admitted or proved:—

(*a*) On September 22, 1927, a police officer stopped a heavy motor car or tractor upon a highway at Chesterton, in the county of Stafford, for the purpose of examining its brakes. The tractor was drawing another vehicle (hereinafter referred to as "the trailer"), consisting of a furniture removal van exceeding 2 cwt. in weight, unladen. Both tractor and trailer were the property of the appellants, and were being driven by a man in their employ, who, in accordance with their usual practice, was not accompanied by any other person.

(*b*) The trailer was fitted with the brake required by art. III. (2.) of the Motor Cars (Use and Construction) Order, 1904, but carried on it no person competent to apply the same, as required under para. 3 of the said article.

(*c*) The tractor was fitted with the two independent brakes required under art. II. (4.) of the said Order, but these two brakes were not so constructed or arranged that neither could be used without bringing into action simultaneously the brake attached to the trailer. The tractor brake system was not in any way connected with that of the trailer brake.

(*d*) The trailer brake was so arranged that it could be operated by a person occupying the driving seat of the tractor independently of the brakes of the latter by the use of a special handle or wheel placed near to that side of the steering wheel which was opposite to the side from which the lever of the tractor hand brake was operated. There was thus a hand operated brake lever on either side of the steering wheel—one for the tractor brake and the other for the trailer brake. But no person (other than the driver of the tractor) was employed anywhere upon either vehicle to operate the hand lever which controlled the trailer brake. The driver of the tractor, whilst keeping hold of the steering wheel with one hand, could, by using his other hand to apply the tractor hand brake, at the same time using his foot to apply the foot brake lever, simultaneously and efficiently apply the two independent brakes of the tractor. Also, whilst keeping one hand on the steering wheel, he could simultaneously apply the trailer brake by its special handle and the foot brake of the tractor. But it was not possible for the tractor driver efficiently to apply the trailer brake simultaneously with the tractor hand brake without taking both hands off the steering wheel.

(*e*) As a result of this arrangement the trailer brake had to be applied or released as a separate operation either before or after the hand brake of the tractor was applied, if the driver retained control of the steering wheel.

The Locomotives on Highways Act, 1896, by s. 6 gave the Local Government Board, now the Minister of Transport, power to make regulations as to use and construction of motor vehicles, and by s. 7 imposed a penalty for breach of any regulations so made.

Motor Cars (Use and Construction) Order, 1904, art. III.: "No person shall cause or permit a motor car to be used on any highway for the purpose of drawing any vehicle, or shall drive or have charge of a motor car when used for such purpose unless the conditions hereinafter set forth are satisfied, namely, ..."

(2.) "Every vehicle exceeding 2 cwt. in weight unladen, drawn by a motor car, shall have a brake in good working order of such efficiency that its application to the vehicle shall cause two of the wheels of the vehicle on the same axle to be so held that the wheels shall be effectually prevented from revolving, or shall have the same effect in stopping the vehicle as if such wheels were so held."

(3.) "The vehicle drawn by a motor car shall, when in pursuance of the condition lastly hereinbefore set forth a brake is required to be attached thereto, carry upon the vehicle a person competent to apply efficiently the brake: Provided that it shall not be necessary to comply with this condition if the brakes upon the motor car by which the vehicle is drawn are so constructed and arranged that neither of such brakes can be used without bringing into action simultaneously the brake attached to the vehicle drawn, or if the brake of the vehicle drawn can be applied from the motor car by a person upon the motor car independently of the brakes of the latter."

It was contended for the respondent:—

(*a*) The driver of the tractor is not the "person upon the motor car" by whom the brake of the vehicle drawn can be applied from the motor car, independently of the brakes of the latter.

(*b*) The regulation in the first instance requires a special person to travel on the trailer for the purpose of applying its brakes (art. III. (3.). If this is impracticable the second part of the proviso to art. III. (3.) allows the position of the lever or handle controlling the trailer brake to be shifted from the trailer to the tractor as an alternative place for the person to apply it, but it does not contemplate that person being dispensed with and the tractor driver taking his place —namely, by reason of this change of position of the operating handle of the trailer brake.

(*c*) If the driver, as well as operating his own tractor brakes and controlling the steering wheel, is to take the place of the "person" controlling the trailer brake, the conditions in this case are specially provided for in the first part of the proviso, that is to say, the brakes of both vehicles must be so mechanically interconnected as to secure that neither of the tractor brakes can be used without bringing into action simultaneously the brake acting on the trailer. In such circumstances the trailer brake is simultaneously applied, whether the driver uses either his hand brake or his foot brake.

(*d*) The use of the word "simultaneously" indicates an essential condition where the driver alone is permitted to control the brakes of both vehicles. This condition could not be complied with in the case of the appellants' vehicle where the application of the respective brakes could only be successive, unless the driver abandoned control of the steering wheel, in which case, particularly in an emergency, he might be held to commit an offence under art. IV. (2.) of the Order.

It was contended on behalf of the appellants:—

(*a*) There is nothing in the wording of the last part of the proviso to exclude the driver from being the "person" to operate the trailer brake. "A person" means any person and not the special person required initially to travel on the trailer under art. III. (3.), who is dispensed with when the alternative condition contained in the second part of the proviso is complied with.

(*b*) In the case of the appellants' vehicle all the conditions prescribed in the second part of the proviso were fully complied with, and the trailer brake could be applied by a "person" upon the tractor independently of the brakes of the tractor. The proviso must be read in its literal sense and not as importing that the special person required under art. III. (3.) to travel on the trailer (or by the side of it, as permitted by the Amending Order of 1925) must be present on the tractor to control the trailer brake lever in its alternative positions on that vehicle.

(*c*) Except in the conditions necessary to satisfy the first part of the proviso, the article nowhere stipulates that both tractor and trailer brake shall be applied simultaneously. Except by chance this could not be the case under the initial condition of para. 3, when each brake is in charge of a separate person, and there is no reason why such requirement should be imported into the second part of the proviso. The expression " simultaneously " in the first part of the proviso only refers to the required effect of the interconnected brake mechanism.

The stipendiary magistrate was of opinion that art. III. (3.) of the Motor Cars (Use and Construction) Order, 1904, was not complied with in the circumstances under which the appellants' tractor and trailer were being used upon the highway in this case, that is to say, where there was thrown upon the driver of the tractor vehicle, in addition to the duties of applying or releasing the two independent brakes of the tractor itself and also maintaining uninterrupted control over its steering wheel, the further duty of efficiently applying or releasing the brake of the trailer vehicle by means of a separate hand brake quite independent of and not mechanically interconnected with the brake system of the tractor, so that if and when an emergency required the simultaneous application of both hand brakes, the steering wheel of the tractor must necessarily be released and left without control, with possibly disastrous consequences. He was further of opinion that art. III. (3.) contemplated the operation of both trailer and tractor brakes by one and the same person only when the said brakes were mechanically interconnected in the manner provided by the first part of the proviso to art. III. (3.). He therefore convicted the appellants of a breach of art. III. (3.) of the Order, and imposed a penalty of 1*l*. and costs

The question for the opinion of the Court was whether upon the above statement of facts the stipendiary magistrate came to a correct determination in point of law.

Jellinek for the appellants. I rely upon the proviso to condition 3 of art. III. of the Motor Cars (Use and Construction) Order, 1904, which provides that if the brake of the vehicle drawn can be applied from the motor car independently of the brakes of the latter then it shall not be necessary to comply with the condition that the vehicle drawn shall carry upon it a person competent to apply efficiently the brake of the trailer. The condition is dealing with the construction of the brakes, and it says that the brake of the trailer must be capable of being applied from the motor car in order to avoid the necessity of carrying a person upon the trailer to apply the brake of the trailer, but it does not say that a person other than the driver of the motor car must be carried on the motor car to apply the brake of the trailer. When it is required that an extra man shall be provided the Order specifically so provides: see the Motor Cars (Use and Construction) Order, 1904, art. III. (3.); the Motor Cars (Use and Construction) Amendment Order, 1925, art. III. (3.), but there is no provision requiring that there shall be an extra man carried on the tractor. The Order is dealing with brakes and not with persons.

[LORD HEWART C.J. It is true that the Order deals with the mechanism of the brakes, but is it not thereby implied that the mechanism can be safely operated ?]

W. T. Monckton for the respondent. It is found as a fact that it is not possible for the driver to apply the brake of the trailer and also at the same time the hand brake of the tractor without losing control of the steering wheel. The first portion of the proviso to art. III. (3.) requires that the brakes of the tractor shall be constructed so that neither can be used without bringing into action simultaneously the brake of the trailer, the object being to stop both tractor and trailer simultaneously. The second part of the proviso deals with a case where the brake of the trailer can be applied from the tractor by a person upon the tractor independently of the brakes of the tractor. "Applied . . . . independently" must mean that the brakes of the trailer can be applied independently of both brakes of the tractor applied simultaneously. "By a person upon the motor car" means by a person other than the driver.

Jellinek replied.

LORD HEWART C.J. This is a case stated by the stipendiary magistrate for the district of the Staffordshire Potteries. It arises in the following way. An information was preferred by the respondent against the appellants under s. 7 of the Locomotives on Highways Act, 1896, for unlawfully causing to be used upon a highway a certain motor lorry drawing a trailer in contravention of the provisions of art. III. of the Motor Cars (Use and Construction) Order, 1904, and art. XVI. of the Heavy Motor Car Order, 1904. The information went on to set out the particulars of the offence as follows: "In that, although the brake required by the first-named Order to be fitted to the said trailer could be applied from the motor lorry drawing the same (independently of the brakes of the latter), no person competent to apply such trailer brake efficiently was upon either the said motor lorry or trailer." The magistrate having heard the case convicted the appellants and fined them, and the question for us is whether he came to a correct determination in point of law.

The material facts are that the trailer was fitted with the brake required by the Order, but carried on it no person competent to apply it. The tractor in its turn was fitted with two independent brakes, but they were not so constructed or arranged that neither could be used without bringing into action simultaneously the brake attached to the trailer. The tractor brake system was not in any way connected with that of the trailer brake. More than that, "the trailer brake was so arranged that it could be operated by a person occupying the driving seat of the tractor independently of the brakes of the latter by the use of a special handle or wheel placed near to that side of the steering wheel which was opposite to the side from which the lever of the tractor hand brake was operated. There was thus a hand-operated brake lever on either side of the steering wheel, one for the tractor brake and the other for the trailer brake. But no person (other than the driver of the tractor) was employed anywhere upon either vehicle to operate the hand lever which controlled the trailer brake. The driver of the tractor, whilst keeping hold of the steering wheel with one hand, could, by using his other hand to apply the tractor hand brake, at the same time using his foot to apply the foot brake lever, simultaneously and efficiently apply the two independent brakes of the tractor. Also, whilst keeping one hand on the steering wheel, he could simultaneously apply the trailer brake by its special handle and the foot brake of the tractor. But it was not possible for the tractor driver efficiently to apply the trailer brake simultaneously with the tractor hand brake without taking both hands off the steering wheel." To sum up those facts, it is found as a fact that "the trailer brake had to be applied or released as a separate operation either before or after the hand brake of the tractor was applied, if the driver retained control of the steering wheel." In other words, as the driver sat upon the tractor he had three brakes which he might deal with: a hand brake for the tractor, and a foot brake for the tractor, and also a hand brake for the trailer. If he wished to apply simultaneously the hand brake for the tractor and the hand brake for the trailer it followed that he must for the time being abandon the steering wheel. The article provides among other things that "the vehicle drawn by a motor car shall . . . . carry upon the vehicle a person competent to apply efficiently the brake," but that condition is subject to certain alternative exceptions stated in the proviso, and in particular that there need not be a person upon the trailer if the brake of the trailer can be applied from the motor car by a person upon the motor car independently of the brakes of the motor car. When one sees what it is to which this proviso relates—

namely, that a person is to be on the trailer competent to apply efficiently the brake—it is clear that the words "if the brake of the vehicle drawn can be applied from the motor car" mean can reasonably and efficiently be applied by a person upon the motor car independently of the brakes of the motor car itself.

The magistrate, having examined the provisions of the article, came to the conclusion that it was not complied with in the circumstances because "there was thrown upon the driver of the tractor vehicle, in addition to the duties of applying or releasing the two independent brakes of the tractor itself and also maintaining uninterrupted control over its steering wheel, the further duty of efficiently applying or releasing the brake of the trailer vehicle by means of a separate hand brake quite independent of and not mechanically interconnected with the brake system of the tractor, so that if and when an emergency required the simultaneous application of both hand brakes, the steering wheel of the tractor must necessarily be released and left without control, with possible disastrous consequences," and he was further of opinion that the third paragraph of art. III. "contemplated the operation of both trailer and tractor brakes by one and the same person only when the said brakes were mechanically interconnected in the manner provided by the first part of the proviso to art. III. (3.)." With regard to that second expression of opinion it is not necessary for the decision of this case, and it may well be, at any rate it is conceivable, that the person referred to in the proviso as a person upon the motor car who may operate the brake of the trailer may also be the person who drives the motor car. That question may have to be determined hereafter; it need not be determined in the present case.

With regard to the first part of the opinion expressed by the learned stipendiary it seems to me that he has made no error in point of law. He has correctly construed the provisions of these rather difficult articles, and he has applied his mind with a true view of the law to the facts of the design, construction and method of control of these two vehicles.

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In these circumstances, while not assenting to the suggested view that the driver of the tractor must not be the person upon the tractor who is regarded as a possible operator of the brake of the trailer, I think that the learned magistrate was right in the conclusion at which he arrived, and that this appeal fails.

AVORY J. I agree entirely and have nothing to add.

ACTON J. I agree.

Appeal dismissed.

Solicitors for appellants: *Amery Parkes & Co., for Gerald W. Huntbach, Hanley.*

Solicitors for respondent: *Few & Co., for R. Eustace Joy, Stafford.*

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Feb. 16, 17, 21;

March 19.

[IN THE COURT OF APPEAL.]

RECKITT *v.* BARNETT, PEMBROKE AND SLATER, LIMITED.

[1926. R. 2265.]

Principal and Agent—Power of Attorney—Power given to Attorney to draw Cheques — Cheque drawn for Attorney's private Purposes — Liability of innocent Payee of Cheque.

The plaintiff gave a power of attorney in favour of T. to indorse or sign the plaintiff's name to any cheque, dividend or interest warrants, to enter into any contracts or arrangements which he, the attorney, might think fit, and to sign and execute all documents which might be necessary or such as he might think fit. As the power of attorney did not in terms authorize T. to draw cheques, a question was raised thereon by the plaintiff's bankers, whereupon the plaintiff wrote to them stating that he "wished the power to cover the drawing of cheques drawn upon you" by T. "without restriction." This letter remained in the custody of the bankers.

T. drew a cheque upon the plaintiff's bank payable to the defendants or order, signed by him as the plaintiff's attorney, but in payment of a debt of his own. This was done without the sanction or knowledge of the plaintiff, who, on becoming aware of the facts, sued the defendants to recover the amount of the cheque as damages for conversion or as money had and received by them to the plaintiff's use:—

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Held, by the Court of Appeal (Scrutton and Sankey L.JJ.; Russell J. dissenting) that the power of attorney must be read as amplified by the letter written by the plaintiff to his bankers, and so read, it had the effect of enabling the bankers and third persons to take with safety cheques drawn by T. as the plaintiff's attorney, unless they had, which the defendants did not have, knowledge or notice of any irregularity in the transaction.

John v. *Dodwell & Co.* [1918] A. C. 563 distinguished.

Decision of Rowlatt J. reversed.

Appeal from a decision of Rowlatt J.

The plaintiff, Sir Harold Reckitt, claimed to recover from the defendants the sum of 200*l.*, being the proceeds of a cheque dated February 5, 1926, drawn by Lord Terrington as the plaintiff's attorney to the order of the defendants.

On February 9, 1915, the plaintiff gave a power of attorney in favour of Lord Terrington (then Mr. Harold Woodhouse) as "my attorney in my name and on my behalf to do all or any of the following things:—

1. To endorse or sign my name to any cheque dividend or interest warrants or other instruments payable to me.

2. To give renew or withdraw authorities or directions to any bankers or other persons or corporations which I would myself give renew or withdraw.

3. To demand sue and receive or prove for in any proceedings whatsoever any money or other property now or hereafter belonging to me and to take and defend all other legal proceedings in which I may be interested.

4. To let and manage all property now or hereafter belonging to me and receive and enforce payment of the rents thereof and make any arrangements with tenants.

5. To settle or compromise or otherwise deal with all actions claims proceedings accounts and disputes relating to my property or affairs and to pay any money and execute any documents in respect thereof which my attorney shall think fit.

6. To invest any money belonging to me in such investments as my attorney shall think fit.

7. To enter into any contract for sale or mortgage or letting or leasing of any part of my estate and to deal with

any moneys received on account of such contract in such manner as my attorney shall think best for my benefit.

8. To engage and dismiss any servants agents or other persons employed by me whether in or about any or either of my dwelling-houses. . . .

9. To enter into any contracts or arrangements which my attorney shall think fit and to vary and put an end to any contracts or arrangements.

10. Generally to act in all respects in relation to my estate or affairs and also in relation to the estate or affairs of other persons for whom I am or may become a trustee executor administrator or agent or have to act in any fiduciary capacity so far as my duties in relation to such last mentioned estates or affairs can be deputed to an attorney with as full and ample powers and in the same manner as I could myself act.

11. For any of the purposes aforesaid to sign and execute all documents papers books and accounts which shall be necessary or my attorney shall think fit.

12. And in particular and without limiting any of the powers hereinbefore given to execute conveyances of any of my property at Brigg in the county of Lincoln." (1)

As the power of attorney did not in terms authorize Lord Terrington to draw cheques, a question was raised by the plaintiff's bankers in reference to this, whereupon the following letter, dated August 17, 1915, was sent to them :—

"Dear Sirs,—Referring to the power of attorney which I have given in favour of Mr. Harold James Selborne Woodhouse, and which you have inspected, please note that I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse without restriction.—Yours faithfully,
(Signed) Harold J. Reckitt."

This letter remained in the custody of the bankers.

On February 5, 1926, Lord Terrington drew a cheque upon the plaintiff's bank payable to the defendants or order for 200*l.*, signed " Sir Harold J. Reckitt, Bart., by Terrington, his attorney," in payment of an instalment of the purchase price of a motor car which he was buying for himself. That cheque was drawn without the knowledge or sanction of the plaintiff, and it was in respect of the cheque so given that, on becoming aware of the facts, the plaintiff brought this action to recover from the defendants the amount as damages for conversion, or, alternatively, as money had and received to the plaintiff's use.

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(1) The plaintiff subsequently executed another power of attorney in favour of Lord Terrington, but that set out above is the one which was chiefly referred to.

The defendants denied that Lord Terrington had not the plaintiff's authority or sanction to draw the cheque, and they alleged that by the terms of the power of attorney and the letter dated August 17, 1915, the plaintiff had authorized Lord Terrington to draw the cheque and hand the same to the defendants, who gave value therefor in good faith.

Rowlatt J. held that as the cheque was drawn on the plaintiff's account for a personal debt of Lord Terrington, the defendants must, on the authority of *John* v. *Dodwell & Co.* (1), be taken to know that the drawing and giving of the cheque was a breach of duty on the part of Lord Terrington, and accordingly he gave judgment for the plaintiff for 200*l.*

The defendants appealed.

Jowitt K.C. and *Farleigh* for the appellants. If an agent acts within the actual limits of his authority, the principal is bound: Bills of Exchange Act, 1882, s. 25; *Bryant, Powis, & Bryant* v. *Quebec Bank* (2); *Hambro* v. *Burnand* (3); *Lloyd* v. *Grace, Smith & Co.* (4) It is a mistake to suppose that if an agent is given an express authority to do an act, and does that act, the principal can escape liability merely because the agent in doing the act is doing it for his own benefit: *Bank of Bengal* v. *Fagan* (5), where Lord Brougham said (6): " But it is said, that the power was given to do the acts in question on the donor's behalf. This is really only

(1) [1918] A. C. 563.
(2) [1893] A. C. 170.
(3) [1904] 2 K. B. 10.
(4) [1912] A. C. 716.
(5) (1849) 5 Moo. Ind. App. 27.
(6) Ibid. 40.

saying, that what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said that, even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power."

[SCRUTTON L.J. referred to *Underwood* v. *Bank of Liverpool and Martins.* (1)]

There the persons who purported to act in reliance upon the agent having authority were negligent in that they made no inquiries when they must have had suspicion that the agent was acting outside his authority. It does not follow that because an agent has authority to indorse cheques he necessarily has authority to pay them in to his own account. So in *Morison* v. *Kemp* (2) the manager of a firm of insurance brokers, having authority to draw cheques per pro., drew cheques in that form and then handed them, in payment of racing debts, to the defendant, who must have suspected that the manager had no authority to draw cheques on the firm and use the firm's cheques for that purpose. But there were no elements of suspicion in the present case. Before a person can be charged with negligence in relying on the prima facie authority of an agent there must be something to arouse suspicion. "The law upon the subject is clear, and in full accordance with sound policy and common sense. It is thus stated in a work of very high authority: 'A wilful and fraudulent absence of inquiry into the circumstances when they are known to be such as to invite inquiry, will (if a jury think that the abstinence from inquiry arose from a suspicion or belief that inquiry would disclose a vice in the bills) amount to general or implied notice': Byles on Bills, 10th ed. (1870), p. 119; 18th ed. (1923), p. 143. And Lord Wensleydale has said: [The phrase] 'Notice and knowledge mean not merely express notice, but knowledge, or the means of knowledge to which the party wilfully shuts his eyes': *May* v. *Chapman* (1)"; per Lord O'Hagan in *Jones* v. *Gordon*. (2) See also per Lord Blackburn in the same case (3); *London Joint Stock Bank* v. *Simmons* (4); *Thomson* v. *Clydesdale Bank* (5); *Corporation Agencies* v. *Home Bank of Canada*. (6) These cases show that nothing short of guilty knowledge or deliberate disregard of the means of knowledge will invalidate the title of one who takes a cheque signed or indorsed by an agent having authority to sign or indorse. In *Morison* v. *London County and Westminster Bank* (7) the authority of the agent was limited to drawing cheques for the purposes of the business of the principal, but the cheques in fact drawn were clearly outside the agent's authority, hence the bank would have been liable but for the protection of s. 82 of the Bills of Exchange Act, 1882. In the present case Lord Terrington's authority was unlimited. In *Underwood* v. *Bank of Liverpool and Martins* (8) Scrutton L.J. put by anticipation the present case when he said (9): "If an agent with a general authority in writing to sell houses sells as agent his principal's house to a third party after production of his authority, it would be useless for the principal to assert that his agent was really selling on his own behalf intending to put the money in his own pocket. 'The apparent authority is the real authority.'" *John* v. *Dodwell & Co.* (10) does not govern this case.

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(1) [1924] 1 K. B. 775.

(2) (1912) 29 T. L. R. 70.

[They also referred to *Jonmenjoy Coondoo* v. *Watson*. (11)]

Schiller K.C. and *R. J. Willis* for the respondent. It is said for the appellants that the act of Lord Terrington was one which he was entitled to do under his authority; hence

(1) (1847) 16 M. & W. 355, 361.
(2) (1877) 2 App. Cas. 616, 625.
(3) 2 App. Cas. 628, 629.
(4) [1892] A. C. 201.
(5) [1893] A. C. 282.
(6) [1927] A. C. 318.
(7) [1914] 3 K. B. 356.
(8) [1924] 1 K. B. 775.
(9) Ibid. 792.
(10) [1918] A. C. 563.
(11) (1884) 9 App. Cas. 561.

no conversion. In fact he was doing something entirely outside the scope of the authority given to him by the power of attorney, and that being so, the appellants are liable. If what an agent does is to abuse his powers, that is one thing; if what he does amounts in effect to the theft of his principal's property, that is an entirely different thing. In doing what he did Lord Terrington was not acting in any business on behalf of the respondent; he appropriated by means of the cheque 200*l.* of the respondent's money and paid it to the appellants in respect of his own private debt. If that is right, the appellants have no defence to this action, unless they can show that they got a negotiable instrument without notice of any defect in the title of the person from whom they took it. Here the appellants were the payees of the cheque and as such are not holders in due course: *Jones* v. *Waring & Gillow.* (1) The only other way in which the appellants could claim to be protected is on the ground of estoppel. Here there is no effective estoppel against the respondent, who made no representation that Lord Terrington had authority to do what he did. In *Morison* v. *London County and Westminster Bank* (2) the bank would have been liable for conversion apart from the special defences afforded by the Bills of Exchange Act, 1882. In *Underwood* v. *Bank of Liverpool and Martins* (3) the bank could have no answer to the plaintiff's claim apart from the Bills of Exchange Act, and they were held not entitled to the protection of those sections inasmuch as they were put upon inquiry by the circumstances connected with the payment in of the cheques. It was said there that Underwood had actual authority to pay the company's cheques into his private account. That contention failed, the Court saying that no director has authority to steal his company's property. That applies exactly in the present case. Where there is a power of attorney to do a particular act, followed by general words, those general words are not to be extended beyond what is necessary for doing the particular act for which the power of attorney was given: *Perry* v. *Holl* (1); see also *Attwood* v. *Munnings* (2) and *Harper* v. *Godsell.* (3) Here the words of the power of attorney must be limited in their scope to things done in and about the principal's business. Any one reading the power of attorney, even if the letter of August 17, 1915, is imported into it, can see that its scheme is to enable the attorney to deal only with Sir Harold Reckitt's interests and business.

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(1) [1926] A. C. 670.
(2) [1914] 3 K. B. 356.
(3) [1924] 1 K. B. 775.

[SANKEY L.J. How do you deal with the passage in Scrutton L.J.'s judgment in *Underwood's* case (4) quoted by Mr. Jowitt?]

In the hypothetical case there put the agent had a general authority. In the case actually before the Court Underwood was not purporting to act as agent for the company; he was acting for himself, just as Lord Terrington was doing in this case. The appellants could have been under no misapprehension in the matter, for they had had no dealings with Sir Harold Reckitt, and so they could not have thought that the payment being made to them was on behalf of Sir Harold. That brings the case within *John* v. *Dodwell & Co.* (5) and makes the appellants liable. In *Bank of Bengal* v. *Fagan* (6) there was nothing to indicate to the bank any infirmity in the title of the person who paid in the promissory notes. That therefore does not touch the present case. Of course, if the power of attorney plus the letter of August 17, 1915, authorized Lord Terrington to do anything he liked with Sir Harold Reckitt's money, the claim here must fail; but the documents cannot possibly bear such a construction.

[SCRUTTON L.J. What do the words "without restriction" in the letter mean?]

They may mean that there is no limitation on the amount the attorney can draw for and on behalf of the principal; that is, so long as the attorney is acting on behalf of the principal the bank cannot question the amount. Or the words may mean that as between the bank and the principal the bank need not inquire of each payee of a cheque if it has been given in respect of a debt incurred on behalf of the principal. The position is not the same as if the words "without restriction" were found in the power of attorney. The letter concerned the bank and no one else, and it remained in the custody of the bank. If any one had asked to see Lord Terrington's authority the power of attorney only could have been shown to him.

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(1) (1860) 2 D. F. & J. 38, 48.
(2) (1827) 7 B. & C. 278.
(3) (1870) L. R. 5 Q. B. 422.
(4) [1924] 1 K. B. 775, 792.
(5) [1918] A. C. 563.
(6) 5 Moo. Ind. App. 27.

[RUSSELL J. Is not the letter evidence of the authority given to Lord Terrington ?]

No ; it only purports to be an authority to the bank to honour the cheques which he has drawn. The letter ought to be disregarded for the purposes of this case.

[SCRUTTON L.J. Suppose Sir Harold Reckitt had lent the money to Lord Terrington to buy the car ?]

If the appellants had been told so they should have inquired if it was the fact. No such statement was made to them and they took the cheque at their own risk, seeing they made no inquiry into the circumstances in which it was given to them. The principle laid down by Ashhurst J. in *Lickbarrow* v. *Mason* (1) that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," does not apply as against the respondent, who did nothing in the transaction.

[SCRUTTON L.J. The respondent gave the bank an authority which enabled the cheque to be cashed.]

But he did nothing in relation to the appellants. Here the signature on the cheque put the appellants upon inquiry as to the regularity of the payment. The cases relied upon for the appellants—*Bank of Bengal* v. *Fagan* (2) ; *Hambro* v. *Burnand* (3) ; *Bryant, Powis, & Bryant* v. *Quebec Bank* (4)—are distinguishable, as in each of them the acts of the agent were of a class which the principal authorized. In *Corporation Agencies* v. *Home Bank of Canada* (5) the question was whether the form of the cheques showed that they had been improperly drawn, and that question the Judicial Committee answered in the negative. That case does not touch the present, nor does *Simmons* v. *London Joint Stock Bank* (1), where a broker pledged his principal's negotiable instruments with a bank as security for an advance to him, the broker, and it was held that there being no circumstances to create suspicion the bank was entitled to retain and realize the securities, having taken them for value and in good faith. In this case Lord Terrington's signature on the cheque was wholly inoperative; and that being so the appellants have no answer to the respondent's claim for conversion in the absence of any estoppel or statutory provision protecting them. The cases defining the limits of conversion are epitomised by Scrutton L.J. in *Underwood's* case (2); see also *McCombie* v. *Davies* (3) and *Ogden* v. *Benas*. (4)

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(1) (1787) 2 T. R. 63, 70.

(2) 5 Moo. Ind. App. 27.

(3) [1904] 2 K. B. 10.

(4) [1893] A. C. 170.

(5) [1927] A. C. 318.

Farleigh in reply. There is a vital distinction between the authority given to Lord Terrington in this case and that given to Abbott in *Morison* v. *London County and Westminster Bank*. (5) In the latter case Abbott was authorized "to draw cheques for the purposes of the business on the banking account of Bruce Morison & Co. at the National Provincial Bank and to sign them in his (Abbott's) name 'per pro. Bruce Morison & Co.'" In the power of attorney given to Lord Terrington the word "business" does not occur, and there is no limitation imposed upon his authority. The contention that the letter of August 17, 1915, cannot be read into the power of attorney is not open, inasmuch as in the pleadings and before Rowlatt J. the attorney's authority was taken as embodied in the power of attorney plus the letter. If the argument for the respondent is right there was no need for the elaborate investigations by the Court in many of the cases cited. If there is anything in the doctrine that a person who has armed his agent with authority is to suffer for his agent's fraud it should be applied here, as all that the appellants

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(1) [1892] A. C. 201.
(2) [1924] 1 K. B. 775, 790, 791.
(3) (1805) 6 East, 538.
(4) (1874) L. R. 9 C. P. 513.
(5) [1914] 3 K. B. 356.

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knew was that the agent was a member of the Legislature, an officer of the Court, and the respondent's solicitor.

[He cited *Commonwealth Trust* v. *Akotey*. (1)]

Cur. adv. vult.

March 19. The following judgments were read :—

SCRUTTON L.J. This is an appeal from a judgment of Rowlatt J., which is said to affect a number of cases, resulting from alleged misconduct of Lord Terrington. Having authority from Sir Harold Reckitt to draw cheques on the latter's banking account, Lord Terrington is alleged to have so misused this authority by drawing cheques for his own purposes that Sir Harold Reckitt has lost over 200,000*l*. As far as Lord Terrington is concerned, allegations as to the state of his health, fortunately or unfortunately for him, detain him in France and prevent him from offering any explanation of his conduct in an English Court; but Sir Harold Reckitt is endeavouring to retrieve his losses by suing the persons to whom Lord Terrington gave the cheques he drew on the Reckitt account. He has succeeded against the present defendants, who appeal.

The facts are comparatively simple. On February 9, 1915, Sir Harold Reckitt gave a power of attorney in favour of Lord Terrington, then Mr. Woodhouse, as his attorney "to do all or any of the following things in my name and on my behalf," and then follow a long list of kinds of business which might be transacted under the power. The list did not include drawing cheques on Sir Harold's account, and apparently some question was raised by the bank. Thereupon Sir Harold on August 17, 1915, wrote the following letter, on the true meaning of which the case largely depends: "Referring to the power of attorney which I have given in favour of Mr. Harold James Selborne Woodhouse, and which you have inspected, please note that I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse without restriction."

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(1) [1926] A. C. 72.

Sir Harold's counsel say (1.) "without restriction" only means without restriction as to amount; (2.) no cheques should be honoured under this letter, unless they were in relation to Sir Harold's affairs. This interpretation appears to me to deprive the letter of all value to the bank. As cheques to all sorts of payees, with no indication on them of the reason they were drawn, would be presented, the bank would have the necessity of inquiring into every cheque before they could safely honour it. I take the letter to be a power to Lord Terrington to draw cheques without restriction, so that the bank could safely honour them without inquiry, and third parties could safely accept them without inquiry. Sir Harold's position being: "I have full confidence in Lord Terrington, and take the risk of his abusing my confidence; you, the bank and third parties, may safely act on his signature without restriction as binding me towards you. I shall have my remedy against him if he does abuse my confidence."

In the present case Lord Terrington bought a Rolls Royce car in his own name from the present defendants on a hire-purchase agreement, and paid the second instalment on it by a cheque for 200*l.* dated February 5, 1926, signed "Sir Harold Reckitt, Bart., by Terrington, His Attorney." All the words except "Terrington" are impressed by a rather faint rubber stamp. The partner of the defendants who took the cheque did not notice the stamp; but the defendants are, of course, bound by the notice of procuration contained on the cheque, and their position is the same as if they had seen the power of attorney and letter amplifying it. The defendants presented the cheque, and Sir Harold's bank paid it. When the frauds were discovered the defendants got back the car by payment of 100*l.*, and Sir Harold sued them for the 200*l.* they were alleged to have converted.

Rowlatt J. gave an oral judgment at the end of the case, as he had to leave for other work. His judgment is this: It is a fraud if the attorney uses his power to rob his principal, but if he does rob him by doing the very thing he is empowered to do it is immaterial, for, as Lord Brougham says in *Bank of Bengal* v. *Fagan* (1), "the abuse of authority does not invalidate the act." I think this so far must be the meaning of the first page of the judgment, though the wording is ambiguous; for the learned judge says in express terms: "The cheque as a cheque was good, there was power to draw it. It did not become a bad cheque because it was fraudulent; it was good." The judge then turns to the effect of the defendants knowing that the cheque was paid to them in respect of an agreement on which Lord Terrington was personally liable. He says: "I am bound to say that when the matter was first opened to me I should have said at once, certainly not. I have been obliged to puzzle about it for a good many hours, but the precise authority upon the point has been produced this morning by Mr. Schiller, which was exactly what I expected. It is *John* v. *Dodwell & Co.* (2)," and he proceeds to hold that the defendant or a third person, taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer, holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. The finding is that, seeing the cheque is drawn on Sir Harold Reckitt's account for a personal liability of Lord Terrington, the defendants must know, or be taken to know, that there is a breach of duty on the part of Lord Terrington. I do not follow why this should be so. From the terms of the letter, Sir Harold Reckitt and Lord Terrington are obviously on terms of great personal confidence. Sir Harold Reckitt may be lending Lord Terrington the money to buy the car for himself, or presenting him with a car; or Lord Terrington may be buying the car for Sir Harold Reckitt as his principal, or to do Sir Harold Reckitt's business by its help. I do not see how Sir Harold Reckitt, who places implicit confidence in Lord Terrington, as shown by his letter, can say to people who are taken to know of the letter: "You must be suspicious of Lord Terrington though you see I am not."

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(1) 5 Moo. Ind. App. 27.

(2) [1918] A. C. 563.

Looking at the matter apart from authority, I should have said that the letter was an actual authority, as far as the bank and third parties are concerned, to Lord Terrington to draw cheques without restriction, which the bank and third parties might act on as valid; and there was no sufficient knowledge or notice of abuse of the power to prevent third parties from keeping the proceeds of the cheque.

I have dealt with the matter so far without reference to authorities, though I quite appreciate that the two points, (1.) the meaning of the letter, and (2.) the effect of Lord Terrington's personal liability as notice, are points of first impression, on which other minds may take different views at sight. I think the difference between the two points of view is this. One side starts with the proposition: "It cannot be within the authority given by a principal to his agent to rob him." If, therefore, you get an act done by an agent with his principal's property for the agent's own benefit, it is outside his authority and third parties cannot rely on it as binding the principal. This view was supported by the language of Willes J. in *Barwick* v. *English Joint Stock Bank* (1), "the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit." From this it was said that if the agent was not acting for the master's benefit, but for his own, the principal was not answerable. This view was negatived by the House of Lords in *Lloyd* v. *Grace, Smith & Co.* (2) I understand the other point of view to be: The principal may be able to say to his agent: "You have abused your authority; account to me for the abuse." But when he has put the agent in a position to do a certain class of acts, and the agent has done an act of that class, apparently on behalf of his principal but really for his own benefit, the principal cannot say to a third party, who without notice of the agent's abuse of authority has accepted the act which the agent has been put there to do: "I am not liable, for my agent, though purporting to act for me, acted for his own benefit." The apparent authority is the real authority.

(1) (1867) L. R. 2 Ex. 259.

(2) [1912] A. C. 716.

The difference may be tested by considering in the present case what would happen if Sir Harold Reckitt sued the bank to recover the amount they paid on this cheque. Surely the bank could say: "You told us Lord Terrington could sign cheques on your account without restriction; you cannot make us liable for honouring a cheque signed by him because in abuse of your confidence he was using your authority for his own benefit."

But counsel appearing before us, each of whom said his case was too plain for argument, and took a long time in arguing it, buried the Court under authorities, to a few of which I must refer.

I take *Bank of Bengal* v. *Fagan* (1); *Bryant, Powis, & Bryant* v. *Quebec Bank* (2); *Hambro* v. *Burnand* (3); and *Lloyd* v. *Grace, Smith & Co.* (4) to decide that if the act done under a power of attorney is warranted by the terms of the power, it is immaterial that the agent is in fact abusing the power by using it for his own purposes. "The apparent authority is the real authority." As Lord Brougham says (5): "though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power."

In the first two cases the fraudulent agent indorsed, but for his own purposes; in the first case he used the indorsed bill as security for his personal debt, but his principal was held liable.

Mathew L.J., in the argument of *Hambro* v. *Burnand* (3), used with great force the illustration: "I go into a bank and find a cashier behind the counter; I pay into the bank, through the cashier, money; must I ask the cashier, 'Are you receiving this for the bank, or going to put it into your own pocket'?" The fact that he is doing the act he has authority to do for his own purposes is immaterial to me who see him doing an act he has apparent authority to do on behalf of his principal. It is different where, as I said in *Underwood's* case (6), the agent having done a neutral act, which is consistent with proper action under his power, such as indorsing in blank in his principal's name a cheque payable to his principal, then does an independent act of paying the cheque into his private account instead of into the company's account. But, as I also said, if he does the act he is apparently authorized to do in order to create privity between the principal and third parties, the case falls within the authorities cited above.

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(1) 5 Moo. Ind. App. 27.

(2) [1893] A. C. 170.

(3) [1904] 2 K. B. 10 (dictum quoted from memory: Scrutton L.J. was of counsel in the case).

(4) [1912] A. C. 716.

(5) 5 Moo. Ind. App. 40.

(6) [1924] 1 K. B. 775.

Rowlatt J. was saved from "a good many hours puzzle," as he says, by the production at the last moment of the case of *John* v. *Dodwell & Co.* (1) It is unfortunate that the parallel case of *Corporation Agencies* v. *Home Bank of Canada* (2) was not produced at the same time. In *John* v. *Dodwell & Co.* (1) the agent had authority to conduct the business of his principal and sign cheques for the purpose of his business; he signed cheques under this power, and used them to pay for his private share transactions. The Privy Council held that the persons taking the cheques had notice of the terms of the power, and the nature of the business told them that the power was being abused; so the principal recovered.

In *Corporation Agencies* v. *Home Bank of Canada* (2) a director and secretary, in fraud of their company, drew cheques on the company's account, as director and secretary, and they were paid into the director's private account at the defendant bank, which presented them to the company's bank, which paid the money. It was held that the company could not recover from the bank, as the director had apparent authority to sign cheques, and the fact that he paid them into his own account was not notice of irregularity, especially as the company's bank paid them.

The distinction between the two cases seems to turn on the finding of notice, or no notice. On the question of conversion argued before us, in *Corporation Agencies* case (2), though conversion was raised on the pleadings, the bank was not held to have converted the proceeds. In *Morison's* case (3), where the bank would have been held guilty of conversion but for their defence under the Bills of Exchange Act, the power was to draw for the purposes of the business; the cheques were drawn per pro., and used for the private account of the agent. It appears to me that conversion would follow, but for the Bills of Exchange Act, from notice of the power and the use made of the cheques. In the present case the power is unlimited, "without restriction," and has the effect, in my opinion, of enabling the bank and third parties knowing of the power safely to take the cheques, unless they have clear notice of fraud. There are, as suggested, also several honest explanations of the transaction, without assuming or suspecting fraud.

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(1) [1918] A. C. 563.

(2) [1927] A. C. 318.

(3) [1914] 3 K. B. 356.

For these reasons I am of opinion that the person to suffer from Sir Harold Reckitt's excessive but misplaced confidence in Lord Terrington must be Sir Harold Reckitt himself, who allowed him to sign cheques without restriction, and not innocent third parties who took such cheques. In my opinion, the appeal should be allowed and judgment entered for the defendants with costs here and below.

SANKEY L.J. The plaintiff in this case claimed (1.) a declaration that he was entitled to recover from the defendants the sum of 200*l.*, being the proceeds of a cheque dated February 5, 1926, drawn by one Lord Terrington as the plaintiff's attorney to the order of the defendants upon the plaintiff's banking account with Barclays Bank, Ld., at Hull, and wrongfully and fraudulently paid by the said Lord Terrington to the defendants in respect of a personal transaction between the defendants and Lord Terrington; (2.) damages for conversion.

The defendants contend that Lord Terrington had authority to draw the cheque in question, that they gave value for it in good faith and became holders in due course, and that they are not guilty of any conversion. The learned judge decided in favour of the plaintiff, and the defendants appeal.

The facts are as follows: In 1915 the plaintiff, being minded to go to France, gave a power of attorney dated February 9, 1915, to one Harold Woodhouse, now Lord Terrington.

[His Lordship read the material clauses of the power of attorney and continued :] In the following August Barclays Bank at Hull pointed out that the said power did not authorize Mr. Woodhouse to draw cheques upon Mr. Reckitt's account. This was brought to the knowledge of the plaintiff, who thereupon wrote the letter of August 17, 1915 : "Referring to the power of attorney which I have given in favour of Mr. Harold James Selborne Woodhouse, and which you have inspected, please note that I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse without restriction."

On January 4, 1926, Lord Terrington entered into a hire-purchase agreement with the defendants for the purchase of a motor car. It is admitted now that the motor car was for his own use. He gave to the defendants the cheque for *200l.*, which is now in question. The cheque was signed : "Sir Harold J. Reckitt, Bart., by Terrington, His Attorney." That part of the signature which referred to Sir Harold Reckitt was stamped with a rubber stamp, but the signature of Lord Terrington was written in ink and was bold and clearly visible. When the defendants took the cheque they did not in fact observe the nature of the signature. The learned judge finds that the defendants took the cheque of the principal—that is, the plaintiff—from the agent—that is, Lord Terrington—in liquidation of the agent's private account. In these circumstances he held that the case was governed by that of *John* v. *Dodwell & Co.* (1) and gave judgment for the plaintiff. Many cases were referred to in argument, the result of which may be stated in general terms.

If the agent in the course of his employment on behalf of the principal had apparent authority to draw the cheque in question, the principal is liable thereon to a person who takes it for value, in good faith, and without notice that the agent has exceeded his authority. To the above must be added that a banker has certain special protection under the Bills of Exchange Act. Apparent authority means that the agent apparently acted within the scope of his authority, and is to be gathered from a consideration of the form of the cheque itself, from any relevant documentary evidence, and from the surrounding circumstances. The agent's motive in drawing the cheque is immaterial, for the fact that he abuses his authority does not destroy the authority. In such cases the apparent authority is the real authority.

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(1) [1918] A. C. 563.

With regard to the question of notice, it is to be observed that the equity doctrines of constructive notice are not to be imported into commercial questions. It would be a dangerous ambition to try to formulate a definition of what constitutes notice. It is impossible to foresee every case and every contingency, but it may be stated that while mere negligence to observe is not sufficient to create liability a wilful disregard of the facts may be. Therefore, in approaching the present circumstances, two questions emerge for consideration: (1.) Had Lord Terrington apparent authority to draw the cheque? (2.) Was there anything in the transaction which gave the defendants notice that Lord Terrington had exceeded his authority?

Where the authority relied on is contained in a written document alone the answer to the first question will depend upon a proper construction of it.

As to the cases cited, the result in each of them depended upon the true answer to one or both of the questions; but the judgments must be read in reference to the particular facts of each case. *Hambro* v. *Burnand* (1) and *Lloyd* v. *Grace, Smith & Co.* (2) were both cases in which it was held that the fraudulent agent acted within the scope of his authority, and so bound his principal, although he acted in his own interests and not in those of the principal. In both cases the motive of the agent was held immaterial.

In *Bryant, Powis, & Bryant* v. *Quebec Bank* (3) Lord Macnaghten (4) says: "The law appears to their Lordships to be very well stated in the Court of Appeal of the State of New York in *President, etc., of the Westfield Bank* v. *Cornen* (5), cited by Andrews J. in his judgment in another case brought by the Quebec Bank against the company. The passage referred to is as follows : ' Whenever the very act of the agent is authorised by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent, as to all persons dealing in good faith with the agent ; such persons are not bound to inquire into facts aliunde. The apparent authority is the real authority.' "

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(1) [1904] 2 K. B. 10.
(2) [1912] A. C. 716.
(3) [1893] A. C. 170.
(4) Ibid. 180.
(5) (1867) 37 N. Y. R. (10 Tiff.) 320, 322.

Morison v. *London County and Westminster Bank* (1) illustrates the protection given to bankers in such cases by the Bills of Exchange Act. There the agent had acted outside the scope of his authority, and his dealings with the cheque amounted to a conversion for which his assignee, the bank, would have been liable but for their statutory protection : see per Lord Reading (2), quoting Lord Ellenborough, who said in *McCombie* v. *Davies* (3) : " A man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it ; for what is that but assisting that other in carrying his wrongful act into effect ? "

Underwood v. *Bank of Liverpool and Martins* (4) was a different case. The first line of defence was that the agent was acting within his apparent authority, and that line of defence failed—see per Scrutton L.J. (5)—and it was held on the facts also that the act of the agent in paying his principal's cheques into his private account was so unusual as to put the defendants on inquiry, and that they lost their statutory protection.

The common law rules as to what is notice in such cases are set out in *Jones* v. *Gordon* (6) and *London Joint Stock Bank* v. *Simmons*. (7) In the former case Lord Blackburn said (8) : " But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless,

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(1) [1914] 3 K. B. 356.
(2) Ibid. 364.
(3) 6 East, 538, 540.
(4) [1924] 1 K. B. 775.
(5) [1924] 1 K. B. 791, 792.
(6) 2 App. Cas. 616.
(7) [1892] A. C. 201.
(8) 2 App. Cas. 629.

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but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind: I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover—I think that is dishonesty."

And in the latter case Lord Herschell said (1): "One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry."

John v. *Dodwell & Co.* (2) proceeded apparently on both grounds: (1.) that the agent held a power of attorney which enabled him to conduct the business of the respondents, and that in doing what he did he was not acting within the scope of his authority—see per Lord Haldane (3), and (2.) that the appellants were affected with notice—see per Lord Haldane. (4)

In the later case of *Corporation Agencies* v. *Home Bank of Canada* (5) Lord Wrenbury points this out where he says (6): "In *John* v. *Dodwell & Co.* (2), Williams, the manager for Dodwell & Co., who was authorized by Dodwell & Co., the plaintiffs (respondents), to draw, and who drew the cheques on the plaintiffs' account, employed the defendants (appellants) as his brokers and gave them cheques on the plaintiffs' account in payment for shares, and they received them with knowledge that Williams, without apparent authority, was drawing for his own purposes on the plaintiffs' funds. The case turned, as does the present case, on knowledge. If there was no knowledge, it has no application."

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(1) [1892] A. C. 221.
(2) [1918] A. C. 563.
(3) Ibid. 567.
(4) [1918] A. C. 568.
(5) [1927] A. C. 318.
(6) Ibid. 324.

Applying these principles to the present case, how do matters stand?

1. Upon the question of authority: This depends upon a proper construction of two documents—namely, the power of attorney and the letter of August 17, 1915. Both must, I think, be looked at in order to see what powers the plaintiff gave and what powers Lord Terrington received. In this I am confirmed by the statement of claim, which pleads that the power of attorney was amplified by the letter. A power of attorney is to be construed strictly. The recitals show its objects and control its meaning, and general words only refer to the special powers. Such a power gives only such authority as it expressly or by necessary implication confers: see *Bryant, Powis, & Bryant* v. *La Banque du Peuple and Quebec Bank* (1) and *Jonmenjoy Coondoo* v. *Watson* (2), which were referred to in argument and are cited in Bowstead on Agency, 7th ed., with other cases at page 73.

It will be observed that the power itself contains very wide authority. Nor is it confined to some particular business whose necessities might in some way control the authority. This is not, for example, a case where an agent with power of attorney to manage and draw cheques for a bootmaker's business drew a cheque to pay for many tons of sugar for future delivery. Over and above that, the letter is in the very widest terms; it confers the right to draw cheques "without restriction." It is not possible, in my view, to limit the words "without restriction" by holding they are to be restricted to the meaning, "without restriction as to amount." It is, perhaps, a trite observation to make that they mean what they say; they indicate that Lord Terrington has power to draw cheques on plaintiff's account for any purpose whatever.

In my view, on a true construction of the two documents, it was within the scope of Lord Terrington's authority to draw the cheque in question. On this point Rowlatt J. was apparently of the same opinion.

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(1) [1893] A. C. 170.
(2) 9 App. Cas. 561.

2. Had defendants notice which ought to have put them on inquiry? This, again, depends mainly, if not entirely, on two documents: (1.) the cheque; (2.) the hire-purchase agreement. It is argued for the plaintiff that the cheque showed that Lord Terrington was only agent, and the hire-purchase agreement showed the transaction was his private one. But there were many situations in which, although the hire purchase was in Lord Terrington's name, it might be a transaction on behalf of the plaintiff. Suppose, on seeing the cheque made out in that form, the defendants had asked for the authority. They would have seen (1.) the very wide terms of the power of attorney, (2.) the unrestricted authority to draw cheques.

In my view, the mere fact in this case that the defendants did not ask to see, and did not see, the documents, cannot place them in a worse position than if they had done so. It is not as if there were any evidence that they said they would rather not inquire into the documents. If they had seen them they would have been justified in coming to the conclusion that Lord Terrington had authority to draw the cheque, and there was no obligation on them to inquire further. "It would be impossible . . . . for the business of a mercantile community to be carried on, if a person dealing with an agent was bound to go behind the authority of the agent in each case, and enquire whether his motives did or did not involve the application of the authority for his own private purposes"—per Collins M.R. in *Hambro* v. *Burnand*. (1)

It is on this point I part company with the learned judge. He says: "The question here all turns upon the effect of the circumstance that it was taken by the defendants knowing that it was drawn by an agent on his principal's account, and knowing that it was being used to liquidate the private debt of the agent." In my opinion, there was no circumstance which ought to have put the defendants upon further inquiry than that of asking to see the power of attorney

(1) [1904] 2 K. B. 10, 20.

and the letter, and if they had seen them they would have been justified in coming to the conclusion that Lord Terrington had authority.

John v. *Dodwell & Co.* (1) is distinguishable and has no bearing on this case. There on the facts there was an absence of authority in the agent and notice to the person taking the cheque. Here it is just the opposite.

In my view, the appeal should succeed and judgment be entered for the defendants with costs.

RUSSELL J. I take a different view in this case from that adopted by the other members of the Court.

The success or failure of this appeal depends, in my opinion, upon the effect which the letter addressed to Barclays Bank at Hull, and dated August 17, 1915, had upon the power of attorney dated February 9, 1915. The letter, be it observed, is addressed by the plaintiff to the bank alone, not (as in the case of the power of attorney) to the world at large; and although its existence and contents were known to the attorney, the original remained in the possession of the bank. The power of attorney, on the other hand, is under seal, and necessarily under seal in view of the provisions of clause 12. It remained, and necessarily remained, in the custody of the attorney. The letter to the bank remained in the custody of the bank and could not have been produced by the attorney except with the co-operation of the bank.

The primary question for determination is whether in these circumstances Lord Terrington had power to draw cheques on the plaintiff's banking account in favour of Lord Terrington's creditors, or, indeed, in favour of whomsoever he might think fit, regardless of the question whether in drawing any cheque he was acting in the management of the plaintiff's affairs. If he had such a power, then he was entitled to draw the cheque in question here; and the plaintiff can obtain no relief against the defendants either on the footing of conversion or otherwise.

If, on the other hand, his power to draw cheques only authorized him to draw cheques for the purpose of managing the plaintiff's affairs, then, in my opinion, the plaintiff is entitled to relief upon the authority of *John* v. *Dodwell & Co.* (1)

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(1) [1918] A. C. 563.

It is, I think, clear that under the power of attorney (apart from the letter) Lord Terrington's powers are carefully and in terms limited to acting in the management of the plaintiff's affairs. Of the first ten clauses, all except No. 9 are in terms confined to the plaintiff's affairs. Clause 9 is expressed in more general terms, but from the context it must be limited in the same way. Clause 11 is in terms limited to "the purposes aforesaid," and is the only clause under which express authority might be said to be conferred to draw cheques on the plaintiff's banking account.

The plaintiff's bankers were apparently unable to accept the power of attorney as sufficient authority to draw cheques, and at their request the letter of August 17, 1915, was written and sent to them. The letter runs thus: "Referring to the power of attorney which I have given in favour of Mr. Harold James Selborne Woodhouse, and which you have inspected, please note that I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse without restriction."

It is said that the plaintiff's statement to the bank that he wishes the power of attorney to cover the drawing of cheques upon them by Mr. Woodhouse "without restriction," operates to enlarge the powers conferred by the power of attorney, and to such a sweeping extent that Lord Terrington became authorized to do what he liked with the plaintiff's moneys, even to the extent of applying them in payment of his own personal debts. It would need words unambiguous and irresistible to enable me to attribute such a meaning and intention to a power of attorney. The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs. An attorney cannot, in the absence of a clear power so to do, make presents to himself or to others of his principal's property. Thus it has been held by the Court of Appeal that a power to mortgage

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(1) [1918] A. C. 563.

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does not enable an attorney to execute a mortgage of the principal's property to secure an existing debt of the principal. Such a mortgage was held to be invalid: *In re Bowles.* (1)

In the present case we are asked to hold that a document under seal addressed to the world at large is completely altered in its scope by virtue of a letter addressed to the plaintiff's bankers and to no one else. We are not, in my opinion, justified in treating the matter as though a clause to the same effect as the letter had been added to the power of attorney. The letter appears to me only a document whereby the plaintiff's bankers would be protected as against the plaintiff in honouring cheques drawn by the attorney.

Even assuming that this letter is not to be treated as a communication made solely to the principal's bank for the purpose of enabling them, without any question, risk, or liability, to honour all cheques drawn by the attorney, but is to be treated as forming part of the power of attorney, I am unable to find words which would justify me in holding that it conferred a power on the attorney to apply his principal's moneys for his private purposes. The words "without restriction" can be sufficiently satisfied by interpreting them to mean without restriction as to amount.

Powers of attorney are to be construed strictly; and where authority to do an act purporting to be done under a power of attorney is challenged, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication: *Bryant's* case. (2)

Construing the power of attorney and the letter upon those principles, I am unable to find either in express terms or by necessary implication authority in the attorney to draw cheques on the plaintiff's bankers in favour of the attorney's personal creditors.

If I am right in this view the plaintiff is entitled to succeed. The defendants took the cheque with knowledge that it was drawn in their favour by an attorney. They are accordingly

(1) (1874) 31 L. T. 365.

(2) [1893] A. C. 170, 177.

fixed with the same knowledge of the attorney's lack of authority as they would have had if they had called for evidence of authority and had had produced to them not only the power of attorney but also the letter. Further, they know that the cheque is handed to them in settlement of the attorney's private debt to themselves, composed partly of an instalment due in respect of Lord Terrington's motor car and partly in respect of Lord Terrington's garage bill.

In these circumstances the case appears to be completely covered by the decision of the Privy Council in *John* v. *Dodwell & Co.* (1) In that case John & Co. (share and produce brokers in Colombo) had two accounts in their books; one with Dodwell & Co., Ld., who were merchants with a branch at Colombo, the other with one Williams in respect of dealings in shares. Williams was the manager at Colombo for Dodwell & Co., Ld., and held a power of attorney which enabled him to draw cheques on his principals' bankers for the purposes of his principals' business. For the purpose of paying his personal indebtedness to John & Co., Williams drew cheques on his principals' bankers payable to John & Co. and signed "Dodwell & Co., Ld., E. H. Williams, Acting Manager," or "Manager." John & Co. received the amounts of the cheques and credited them against the personal indebtedness of Williams. Lord Haldane, in delivering the judgment of the Board, held that John & Co. were liable to refund the amounts to the principals on the ground that they received and held the money under a transmitted fiduciary obligation to account for it to the principals. He further held that, according to English law, there had been a conversion by John & Co. He uses this language (2): "On the face of these Williams was, without showing authority to do so, drawing cheques for his own purposes on the respondents' funds at their bankers. If it turned out that the respondents had not allowed him to do so, and would not ratify his action, the notice which the appellants had got through the agency of their clerks of what was prima facie a breach of duty on his part would deprive them of all title to hold the cheques as against the respondents, if the latter should challenge the transaction. For when an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is, by virtue of doctrines which apply under the law of Ceylon, as they do under the law of this and other countries, in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of Courts which administer equity, whether in the form in which the Court of Chancery in this country applied it to trusts, or in the form which later developments of the Roman law have recognized. It is therefore clear that, excepting in so far as the lapse of time or some other special circumstance afforded them a defence, the appellants could not withhold the money in question from the respondents if they chose to claim it. The respondents did claim it, and commenced an action on January 10, 1913, to enforce their claim. The claim as formulated in their plaint was alternative. In the first alternative they expressed it as for money had and received; in the second, as for a conversion; in the third, as for cheques received with notice of Williams' fraud. In the judgments in the Court below it was the first and second of these alternative forms of claim which received attention. Their Lordships are of opinion that the course so taken was unnecessary. It would have been, in their opinion, sufficient to have disposed of the case on the footing that the money was, in the circumstances, what may properly be called trust money, consistently with principles of jurisprudence based in part, though not wholly, on a foundation of Roman law. If the appellants received such money with notice of the trust affecting it, they would be bound to account for it to the respondents. It is on this footing that their Lordships propose to deal with the question.

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(1) [1918] A. C. 563.

(2) [1918] A. C. 569.

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The case was not disposed of in this way in the judgments below, but the facts proved and the pleadings admit of its being thus dealt with. It may well be true that the principles of the English common law have been so far recognized in the jurisprudence of Ceylon as to admit of the same question being treated as one of a conversion having taken place. If so, undoubtedly there was a conversion according to these principles."

That case was distinguished in the later Privy Council decision in the *Corporation Agencies* case. (1) The distinction between the two cases is clear. In the *Corporation Agencies* case (1) cheques drawn by a company (and signed according to the company's regulations) in favour of a director (whose name appeared as one of the two signatories to the cheque) were indorsed by him, and paid to the credit of his private account with the Home Bank, which collected the moneys in due course from the company's bankers. The company sought to recover the moneys from the Home Bank, but failed on the ground that the Home Bank had no notice that the company's cheques (though signed by the director as one of the signatories) were not properly drawn in his favour; nor was there any duty on the Home Bank to inquire.

In *John* v. *Dodwell & Co.* (2) and in the case under appeal the person sued has notice of the limited authority of the attorney and of the fact that the authority is being exercised not in relation to the principal's affairs but for the purpose of paying a debt due by the attorney to the defendants.

Much reliance was placed by the appellants on *Bank of Bengal* v. *Fagan* (3), and in particular upon the remarks of Lord Brougham, which run as follows (4): "But it is said, that the power was given to do the acts in question on the donor's behalf. This is really only saying, that what the agent is to do, he is to do as representing the principal; as doing it on behalf of, or in the place and in the right of, the principal. But it is further said that even if the expression be read as only amounting to this, the indorsement is to be only made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purpose of the execution, not to the limits of the power itself; and though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power." In that case the power was not in terms limited to transacting the business of the principal. The attorney had indorsed certain negotiable instruments and handed them to his bankers as security for a personal loan. The question for decision was whether the indorsement passed the property in the negotiable instrument, the negligence of a party taking a negotiable instrument not fixing him with notice of defective title. The question resolved itself into this: Had the attorney power to indorse? If he had, the property passed, and it was immaterial to consider the attorney's intention in indorsing. Lord Brougham's remarks must be taken in reference to the case which he was deciding.

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(1) [1927] A. C. 318.
(2) [1918] A. C. 563.
(3) 5 Moo. Ind. App. 27.
(4) Ibid. 40.

In the case under appeal the act done is signing a cheque in favour of a payee who was a creditor of the attorney and not a creditor of the principal. That act the attorney had, in my opinion, no authority to do, and Lord Brougham's remarks appear to be inapplicable to the present case.

The authorities cited to us in the argument were very numerous. I will say a few words about such of them as appear to me relevant to the present case. *Bryant's* case (1) involved two decisions. In the appeal against the Banque du Peuple, the principal was held not to be indebted to the bank in respect of a loan contracted in its name by its attorney for his own purposes, because upon the true construction of the power of attorney the attorney had no power at all to borrow money on behalf of the company. In the appeal against the Quebec Bank the company was held liable to that bank in respect of two bills of exchange indorsed in the name of the company by the attorney and discounted

(1) [1893] A. C. 170.

by the bank in the ordinary course of business. The power of attorney in terms authorized the attorney "to indorse bills of exchange . . . . and other documents which shall in the opinion of the said attorney require the signature or indorsement of the company." The Board held that the fact that the attorney abused his authority could not affect bona fide holders for value of negotiable instruments indorsed by him in accordance with his authority. That case appears to me to be of no assistance in favour of the defendants in the present case. The authority to indorse was clear; the motive which prompted the indorsement was immaterial.

The same is to be said of *Hambro* v. *Burnand.* (1) There the authority to do the particular act, namely, to sign a guarantee policy, was, upon the facts as found in that case, clearly within the agent's authority, and the principals were bound notwithstanding that the agent abused his authority for his own purposes.

Some of the authorities cited were cases where the party sought to be made liable was a bank which had collected the proceeds of an unauthorized cheque. Such cases are complicated by additional defences which may be raised under the Bills of Exchange Act, 1882. *Morison* v. *London County and Westminster Bank* (2) is of this class, but is of importance here. In that case the principal gave authority to Abbott to draw cheques for the purpose of the principal's business on the principal's banking account at the National Provincial Bank, and to sign them in his (Abbott's) name per pro. Bruce Morison & Co. He further gave directions to the National Provincial Bank to honour cheques so drawn. Abbott opened a private account with the defendant bank and paid into it various cheques drawn on the principal's banking account and signed by him per pro. Bruce Morison & Co., which were collected in the ordinary way by the defendant bank and the proceeds placed to the credit of Abbott's private account. The principal sued the defendant bank for the amount of the cheques so collected as damages for conversion of the cheques, or, alternatively, as money had and received. The defendants

(1) [1904] 2 K. B. 10.

(2) [1914] 3 K. B. 536.

were held not liable as to part of the claim by reason of s. 82 of the Bills of Exchange Act, and as to the rest of the claim by reason of ratification by the principal. The actual decision appears to have no relevance here, but Lord Reading in his judgment (1) makes it clear (*a*) that by reason of the direction and authority given by the principals to their own bankers to honour all cheques signed by Abbott per pro. Bruce Morison & Co., no claim could be made against those bankers, and (*b*) that the defendant bank had no valid title to the cheques, because Abbott issued the cheques to them in fraud of Bruce Morison & Co.; and that, but for the special defences available, the defendants would have been liable for conversion of the cheques, the measure of damages being the moneys lost by Bruce Morison & Co. and wrongfully received by the defendant bank. The judgment of Lord Reading appears to indicate that no valid title to the cheque would pass to the defendants in the present case. It is further of interest to observe that the direction to the principal's bankers to honour all cheques signed by Abbott per pro. Bruce Morison & Co. was not treated as operating to enlarge Abbott's authority, but only as operating to relieve the principal's bankers from liability.

Reference may also be made to the decision of Darling J. in *Morison* v. *Kemp*. (2)

As to the case of *Lloyd* v. *Grace, Smith & Co.* (3) no one can now dispute that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. The agent must, however, be acting within the scope of his authority.

In the present case there is no question of the agent defrauding a third person. The question is a very different one—namely: Can a personal creditor of the agent retain as against the principal, moneys paid by the agent to the creditor in satisfaction of his debt, which moneys belong to the principal and are known by the creditor to belong to the principal?

(1) [1914] 3 K. B. 363, 364, 365.

(2) 29 T. L. R. 70.

(3) [1912] A. C. 716.

No useful purpose will, I think, be raised by referring to other authorities cited. None of them appear to be inconsistent with or contrary to the decision in *John* v. *Dodwell & Co.* (1) The result of this appeal depends upon the construction and effect of the plaintiff's letter to his bankers. That letter did not, in my opinion, operate to confer a power on the attorney to draw cheques in favour of his private creditors. The case is covered by the decision in *John* v. *Dodwell & Co.* (1) whether the plaintiff's claim be put on the footing of conversion by the defendants or on the footing of a fiduciary obligation binding upon them. In my opinion, the appeal fails and should be dismissed.

Appeal allowed.

Solicitors for appellants: *Charles Humphries & Co.*
Solicitors for respondent: *Nicholl, Manisty & Co.*

(1) [1918] A. C. 563.

J. S. H.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A.
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Feb. 27.

THE KING *v.* ERNEST ARTHUR HAILWOOD.

THE KING *v.* HAILWOOD AND ACKROYD, LIMITED.

Election Law—Offence—Promoting Election of Candidate without Authority—Inviting Voters to oppose One of Three Candidates—Representation of the People Act, 1918 (7 *&* 8 *Geo.* 5, *c.* 64), *s.* 34, *sub-s.* 1.

The Representation of the People Act, 1918, s. 34, sub-s. 1, provides that a person other than the election agent of a candidate shall not incur any expenses on account of issuing advertisements, circulars or publications "for the purpose of promoting or procuring the election of any candidate" at a parliamentary election unless he is authorized by such agent.

During an election at which there were three candidates, Conservative, Liberal and Labour respectively, the appellant, who was a Conservative in politics but disapproved of the existing Conservative Government on special grounds, incurred expenses on account of issuing posters, circulars and publications which were antagonistic to the Conservative candidate and advised the constituents not to vote for him, but did not in express terms advise them to vote for the other candidates or either of them:—

Held, that the appellant had acted in contravention of the above sub-section, and that a conviction against him thereunder should stand.

APPEALS against convictions.

On June 27, 1927, a parliamentary by-election took place for the Brixton Division of the Borough of Lambeth, and during the preceding part of that month the preparations for the election were in progress. At the election there were three candidates, Conservative, Liberal, and Labour respectively. Mr. E. A. Hailwood, the managing director of Hailwood & Ackroyd, Ld., was a Conservative in politics, but he objected to the existing Conservative Government on special grounds, more particularly their alleged failure to effect the safeguarding of industries, and their proposal to extend the franchise to women at the age of twenty-one. Before and during the day of the election Mr. Hailwood caused to be driven through the streets of the constituency two of his company's motor lorries, which were placarded with posters, and contained men who distributed circulars and publications, antagonistic to the Conservative candidate and advising the constituents not to vote for him. Among the statements contained in these documents were the following: "Evidently Britain first does not appeal to the Conservative party. Why support it?"; "Give the Conservatives a 'kick' and vote for anyone but Conservative"; "Pitch them (the Conservatives) out at this election"; and "Vote anything but Conservative."

Mr. Hailwood and Hailwood & Ackroyd, Ld., were prosecuted for alleged contraventions of the Representation of the People Act, 1918, s. 34, sub-s. 1. (1) The first count of the indictment charged them with having unlawfully incurred expenses on June 27, 1927, contrary to that sub-section on account of issuing advertisements and publications for the purpose of promoting and procuring the election of a candidate other than the Conservative candidate at the election; the second count charged them with having done the like on that date for the purpose of promoting and procuring the election of the Liberal candidate or of the Labour candidate; and the other counts charged them with similar offences on June 22, 23 and 24, 1927, respectively.

On December 9, 1927, the defendants were tried at the Central Criminal Court before Talbot J. and a jury. Mr. Hailwood stated in evidence that he did not intend to promote the election of the Liberal and Labour candidates or either of them, and that his purpose was merely to reduce the majority of the Conservative candidate. Both defendants were convicted and fined.

Both defendants appealed on the grounds that the indictment was bad in that it did not specify the candidate whose election the defendants had the purpose of promoting or procuring; that the evidence disclosed no offence in law in that it was not proved that the defendants had the purpose of promoting or procuring the election of either the Liberal or the Labour candidate; and that the learned judge misdirected the jury in failing to direct them as to the meaning of "purpose" in the sub-section.

(1) The section is set out below in the judgment of the Court.

Comyns Carr K.C. (*Walter Frampton* with him) for the defendants, appellants. The defendants did not commit any offence under the Representation of the People Act, 1918, s. 34 (1), and the conviction was wrong and should be quashed. That section provides by sub-s. 1 that a person other than the election agent of a candidate shall not incur any expenses on account of issuing advertisements, circulars or publications "for the purpose of promoting or procuring the election of any candidate" unless he is authorized by such agent; and by sub-s. 2 that if a person acts in contravention of the section he shall be guilty of a corrupt practice within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883. The last mentioned Act makes a distinction between corrupt practices which necessarily involve intention and illegal practices which do not necessarily involve intention: see per Field J. in *In re Barrow-in-Furness Election Petition*. (2) In order that the acts mentioned in s. 34, sub-s. 1, of the Act of 1918 shall constitute an offence within the meaning of the section, it is therefore essential that they should have been done with the intention of promoting or procuring the election of a candidate. In the present case the evidence shows that the defendants did not do the acts in question with the intention of promoting or procuring the election of any of the candidates and therefore they were not guilty of the offence created by the section. The section provides that a person other than the election agent of a candidate shall not do the acts mentioned for the purpose of promoting or procuring the election of "any candidate" at the election unless authorized by "such election agent." According to its true construction that provision means that a person shall not do these acts for the purpose of promoting or procuring the election of a particular candidate at the election without the consent of the agent of that candidate. Even if the defendants did acts which promoted the election of the candidates other than the Conservative candidate, they did not promote the election of either of

(1) The section is set out below in the judgment of the Court.
(2) (1886) 4 O'M. & H. 76, 77.

these other candidates in particular, and therefore they did not commit the offence contemplated by the section. Further, the section provides that a person shall not do the acts mentioned for the purpose of "promoting or procuring" the election of any candidate. The defendants did not do the acts in question for the purpose of promoting or procuring the election of any one of the candidates at the election, but only for the purpose of preventing the election of the Conservative candidate. The evidence shows that the purpose of the defendants was merely to reduce the majority of the Conservative candidate. The learned judge did not sufficiently direct the jury in regard to the nature of the offence under s. 34. That offence involves purpose or intention. Where the gist of an offence is intention the judge should expressly ask the jury to consider whether the accused acted with intention: *Rex* v. *Shevill.* (1) Here the judge did not expressly direct the jury that the defendants could not be guilty of the offence unless they incurred the expenses in question with the actual intention of promoting the election of a candidate, but left it to them to suppose that they could infer that the defendants had that intention from the fact that they incurred the expenses.

R. Oliver K.C. and *Willoughby Williams* for the prosecution were not called upon.

The Court (AVORY, HORRIDGE and SALTER JJ.) dismissed the appeals.

AVORY J. delivered the judgment of the Court as follows: In this case the two appellants Ernest Arthur Hailwood and Hailwood & Ackroyd, Ld., were convicted of an offence under the Representation of the People Act, 1918, s. 34, which provides: "(1.) A person other than the election agent of a candidate shall not incur any expenses on account of holding public meetings or issuing advertisements, circulars or publications for the purpose of promoting or procuring the election of any candidate at a parliamentary election, unless he is authorised in writing to do so by such election agent. (2.) If any person acts in contravention of this section, he shall be guilty of a corrupt practice other than personation within the meaning of the Corrupt and Illegal Practices Prevention Act, 1883, and the expression 'corrupt practice' shall be construed accordingly. . . . ." It is important to observe that these sub-sections do not enact that a person shall be guilty of the offence which they constitute only if he does the things specified corruptly, but, having forbidden a person to do these things, they provide that if he acts in contravention of the section he shall be guilty of a corrupt practice within the meaning of the Act of 1883 and liable to be punished accordingly. To sub-s. 2 there is a proviso that the Court may, if they think it just, remit the punishment for the act forbidden. Sub-s. 3 provides that any expenses incurred on account of any such purpose as aforesaid and authorized by the election agent of the candidate shall be duly returned as part of the candidate's election expenses.

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(1) (1923) 17 Cr. Ap. R. 97.

The object of that section is plain. Prior to the Act of 1918 the statutes dealing with unlawful practices at parliamentary elections had fixed a maximum amount which could be lawfully expended by the candidate at an election, and had required that the election agent should make a true return of the candidate's expenses. It was then found that associations and persons other than the candidates and their agents might be and were incurring expenses for the purpose of promoting or procuring the election of a candidate, although they were not authorized to do so by the election agent of the candidate, and that expenses so incurred would never be included in the agent's return. It was in order to put a stop to that practice that this section was passed. The position now is, in regard to expenses of the kind described in the section, that if the election agent has not authorized the expenses it is an offence to incur them; and that if he has authorized them he must return them as part of the candidate's expenses.

It is now suggested that, in a case like the present, where there are three candidates representing three different political parties, Conservative, Liberal and Labour, if a person who is not authorized by the election agent of a candidate incurs expenses of the kind in question he cannot be convicted under the section, which prohibits the incurring of the expenses for the purpose of promoting or procuring the election of "any candidate," unless it be shown definitely that he had the intention of promoting or procuring the election of one of these three candidates in particular. The answer to that suggestion is that the expression "any candidate" in the section is not limited to one candidate only, since it is provided by the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 1, sub-s. 1 (*b*), that words in the singular shall include the plural.

It is further said that the appellant is not liable, inasmuch as while he endeavoured to prevent the election of one of the candidates, he did not directly promote or procure the election of any of them. If, however, a person has done what is forbidden by the section for a purpose which must have the effect of promoting or procuring the election of a candidate or candidates then there can be no question that he has committed an offence under the section. Here not only was there evidence that what was done by the appellant was done for a purpose which must have had the effect of promoting the election of the candidates or one of them other than the Conservative candidate, but a jury which hesitated to find that it had been done for that purpose would clearly have been neglecting its duty. The nature of the posters, leaflets and advertisements issued by the defendants shows that their purpose was to keep out the Conservative candidate. One of them uses in reference to the Conservatives the terms "Pitch them out at this election." Another advises the constituents to "Vote anything but Conservative." No possible construction can be put upon these documents except that they hold out an invitation to the electors to vote for the candidates other than the Conservative candidate. There can be no question that the defendant Mr. Hailwood did what he did in order to promote the election of these other candidates. It is said that that defendant both by his evidence and by a letter of instructions for the preparation of a

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document showed that his intention was only to reduce the Conservative majority and not to promote the election of either of the other candidates. It is not, however, open to a person charged with the doing of acts forbidden by the statute, who has done acts to prejudice one of the candidates which must and must to his knowledge have had the effect of promoting the election of the other candidates or one of them, to say that he never intended his acts to have that effect. As Talbot J. truly said in his summing up: "The motive that is in a gentleman's mind is one thing, the purpose for which he takes his action is another." The section does not say that a person shall not do the acts forbidden with the intention of promoting or procuring the election of a candidate, but that he shall not do these acts for the purpose of promoting or procuring the election of a candidate. What the defendants did would have the effect, and was intended to have the effect and must have had the effect of promoting the election of the candidates other than the Conservative.

So far as any criticism can be offered upon it, the summing up of Talbot J. to the jury was more favourable to the accused than it need have been. In the course of it these words are used: "You may think on the other hand that you cannot say that he incurred this expense for the purpose of procuring the return of one of those two gentlemen, because that was not the dominant motive in his mind." He might have said to the jury that it did not matter what the dominant motive was in the mind of the accused, but that if his acts must have had the effect of promoting the return of some candidate other than the Conservative candidate, then he must be taken to have intended the natural consequences of his acts.

In the opinion of the Court there are no grounds to support these appeals.

Appeals dismissed.

Solicitors for appellants: *Gibson & Weldon, for A. A. Burton, Leeds.*

Solicitors for prosecution: *Lewis & Lewis.*

J. R.
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March 1.

[IN THE COURT OF APPEAL.]

GARDINER *v.* HEADING AND ANOTHER.

Principal and Agent—Work done on Order of Agent—Credit given to supposed Principal—Mistake—Liability of Agent.

In an action tried in the county court it appeared that the plaintiff, a builder, did certain work on the order of one H., a director of a certain company for which the plaintiff had previously done work on H.'s order. As the work proceeded the plaintiff prepared estimates and addressed them to the company whose name he had entered in his books. When the work was finished he was paid a sum on account, but when trying to get payment of the balance he was told that the work had not been ordered on behalf of the company, but for other principals. Thereupon he sued H. The county court judge found that H. impliedly undertook personal liability for the work; that the plaintiff gave credit to the company up to a certain date, but did so under a mistaken impression, and that he never gave exclusive credit to them in such a way as to bind himself to look to them; and that he never gave credit to H. before the work was completed. On the facts and findings:—

Held, that H. was rightly held liable for the balance.

Appeal from the judgment of a Divisional Court affirming the decision of the judge of the Westminster County Court in the following circumstances.

The plaintiff was a builder carrying on business in Cromer Street, King's Cross. At some time before October, 1926, the defendant Heading had given him an order for some work for a company called the Finance Guarantee Company of which the defendant Heading was a director.

The plaintiff had done the work. Not having been paid for it he went to the office of the company early in October, 1926, and saw the defendant Heading, who said, "I have got another job for you, meet me here to-morrow and I will show it to you." The plaintiff called again the next day, and a few days later he was taken to No. 246 High Holborn and there the defendant Digby told him what was required and ordered him to begin the work, and the defendant Heading afterwards confirmed these instructions. The work was begun on October 18, 1926. Thinking that the work had been ordered on behalf of the Finance Guarantee Company

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the plaintiff made out estimates as the work proceeded and addressed them to that company. He handed some of these estimates to Digby and the others to Heading, and they were received without any comment by the defendants or either of them. The work was finished on or before November 14, 1926. The plaintiff's claim in respect of it amounted to 104*l.* Digby then told him to paint on the front of the premises the name, "Metropolitan Housing Corporation, Ld." When the plaintiff applied for payment he was told by one Turner, another director of the Finance Guarantee Company, that the work had not been ordered for that company, but for the Metropolitan Housing Corporation, Ld. This was a company having a nominal capital of 1050*l.* divided into 1000 shares of 1*l.* and 1000 shares of 1*s.* Heading, Digby and Turner held one share each. Kingsway House was the address of both the Finance Guarantee Company and the Metropolitan Housing Corporation. On November 10, 1926, Digby handed the plaintiff a cheque for 26*l.* bearing the original date October 9, 1926, which had been altered to November 15, drawn by one Weaver, a director of the Metropolitan Housing Corporation, to his own order and indorsed. This cheque was presented on or after November 15 and dishonoured. Digby also handed the plaintiff another cheque for 26*l.* drawn by the Coulsden Housing Company in favour of the Metropolitan Housing Corporation, and indorsed by two persons purporting to act on behalf of that company. This cheque was presented and paid. In February, 1927, after the plaintiff had been pressing for payment of the balance due to him, Digby handed him a bill of exchange for 78*l.* dated February 16, 1927, accepted by Weaver, "Director of Metropolitan Housing Company," and advised him to sign it as drawer and get it discounted. The plaintiff took it and signed a receipt in the form "Received of the Metropolitan Housing Company bill of exchange 78*l.* in respect of account for that amount." He took this bill to Heading, who told him it was useless as it was not drawn on a banker and advised him to apply to Digby for a cheque on a banker. When he went to Digby he was told that the Metropolitan Housing Corporation had no banking account. Thereupon he told Heading and Turner that he would look to Heading and Digby for the balance of his account if he could not get payment by the Finance Guarantee Company. Being unable to get payment of the balance, 78*l.*, he put the matter in the hands of his solicitor. He had in the first instance given credit to the Finance Guarantee Company and had no intention of holding Heading and Digby responsible until after November 15, 1926.

The action was brought in the High Court on March 17, 1927, against Heading and Digby by a writ specially indorsed under Order III., r. 6. Heading denied that he was in any way liable. The case was then remitted to the Westminster County Court.

When the evidence was concluded counsel on both sides agreed that the following were the questions to be decided; the answers given by the judge, in one instance agreed between counsel, are added:—

1. Did Heading order or authorize the order of the work and labour in question? Yes.

2. If yea. (*a*) Did Heading give or authorize the order exclusively as agent for the Finance Guarantee Company? (*b*) Had Heading authority to order or authorize the order of the work and labour in question on behalf of the Finance Guarantee Company?—Answers, agreed by counsel, (*a*) No; (*b*) Does not require an answer.

3. Did Heading expressly or impliedly undertake any personal liability for the work and labour (*a*) before November 19, or (*b*) at any time?—Answer, Expressly, No; Impliedly, Yes at all material times.

4. Did the plaintiff give exclusive credit to the Finance Guarantee Company until November 19, 1926?—Answer, The plaintiff gave credit to the Finance Company up to a certain date, but gave such credit under a mistaken impression. He never gave exclusive credit to the Finance Guarantee Company, i.e., in such a way as to bind himself to look to that company.

5. Did the plaintiff know that he was dealing at all material times with Heading as an agent ? No.

6. Did the plaintiff give credit to Heading at any time before the work was completed ? No.

Upon these findings the learned county court judge entered judgment for the plaintiff against both the defendants. On appeal to the Divisional Court that Court (Shearman and Finlay JJ.) affirmed the judgment.

The defendant Heading appealed.

du Parcq K.C. and *B. Mackay Cloutman* for the appellant. It is admitted by the respondent and found by the county court judge that credit was not given to the appellant until after the work was done. Consequently the work was not done under any contract between the parties. The respondent never intended to contract with the appellant. It is contrary to principle to say, if a builder enters into a contract to do work intending to contract with one person and not intending to give credit to any one else, that he can subsequently rely upon a contract with some one else, simply because the order in fact came through the last mentioned person. He cannot say this because a contract is an agreement between two minds. Here there was only one mind, therefore there was no contract.

[SCRUTTON L.J. Does that follow ? If A. makes a contract with B., and then it appears that B. was acting as agent for C., A. may charge C. on the contract, though he did not intend to contract with him.]

There is nothing to prevent a principal making a contract through the medium of an agent. In that case there is a contract with the principal. In the present case there is no contract at all with the appellant.

[SCRUTTON L.J. Except that he ordered the work.]

He did so as agent either, as the respondent thought, for the Finance Guarantee Company, or, as the fact was, for the Metropolitan Housing Corporation, but in any case not as a principal. The fact that a person is the mouthpiece through which a contract is made does not necessarily imply that

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he is to be liable upon it. No one would bring an action against a salesman behind the counter in a draper's or a grocer's shop, or against a clerk in a ticket office. It is probable that the respondent would not have done the work at all if he had been offered the sole credit of the appellant. Except in the case of an undisclosed principal, which is to be explained as above, it is an elementary principle inherent in the consensual nature of a contract that there cannot be a contract between one person and another with whom he never intended to contract: *Cundy* v. *Lindsay*. (1) "Where the principal is in existence, but the supposed agent has no authority from him, it is now well established that the supposed agent cannot himself be treated as principal and be sued on the contract . . . . unless the contract can be construed as a contract made by the supposed agent personally": 2 Smith's Leading Cases, 12th ed. (1915), pp. 368, 369; Notes to *Thomson* v. *Davenport*. (2) To this principle is largely due the doctrine of warranty of authority, which is based on the assumption that the agent cannot be sued on the contract. It is constantly applied in cases like the present and formed the ground of the judgment in the Court below, in spite of the technical difficulty that an action for breach of warranty sounds in damages and that the present action was commenced by a specially indorsed writ. But if when credit is given to the principal the agent can be sued on the contract, there will be no further reason for bringing an action for breach of warranty of authority, except in those cases where the agent expressly excludes his personal liability.

H. Bensley Wells for the respondent was not called upon.

SCRUTTON L.J. This is an appeal from the decision of a Divisional Court on appeal from the judgment of a county court judge. The findings of fact by the learned judge, which bind both the Divisional Court and this Court, are as follows: The respondent was a builder in a small way of business. He had on a former occasion done some work for a company known as the Finance Guarantee Company, which had been introduced to him by Heading, the appellant. In October, 1926, the appellant said to him, "I have got another job for you"; he showed him the place where the work was to be done—namely, at 246 High Holborn—and there the defendant Digby, who is not a party to this appeal, showed him the work to be done and told him to start the work, and the appellant confirmed this and gave directions about the materials to be used and details of interior decoration. The respondent believed that the order was being given on behalf of the Finance Guarantee Company, and he entered it in his books as having been so given; but in this he was mistaken, for that company had nothing to do with the work. It is an unpleasant fact in this case that the appellant, knowing that the work was not for the Finance Guarantee Company, stood by and did nothing to undeceive the respondent. When the work was nearly finished and the respondent was applying for payment on account, some one connected with the company told him that the work was not for that company, but that it was the Metropolitan Housing Corporation that had to pay him. Of this concern we know little beyond that Heading and Digby held each one share of 1*s.* in it. We do not know that there was any other paid up capital. When a cheque was paid for 26*l.* it was not drawn on any account of the Metropolitan Housing Corporation, but on another account altogether. Moreover the appellant never said he was acting for the Metropolitan Housing Corporation, and did not go into the witness box to say he was. When the respondent was told that the work was not for the Finance Guarantee Company he said to the appellant, "Then you and Digby are the persons to pay." He admits however that up to the time when the work was finished he was looking to the Finance Guarantee Company for payment.

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(1) (1878) 3 App. Cas. 459.

(2) (1829) 9 B. & C. 78.

What is the legal result of these facts? To begin with, the person who orders work to be done is prima facie liable to pay for it. Mr. du Parcq contends that the all important question is, To whom was credit given? and that if while the work is being done you are giving credit to, or expecting to be paid by, one person you cannot afterwards say that another is liable. In my view that is not the law. In one particular case it is clearly not the law. If a party makes a contract in his own name and the other party, the promisee, finds that the promisor has an undisclosed principal, although he never knew of him and therefore could never have given credit to him, yet he may sue him, because he has in fact made a contract with him. But if a man who contracts with another thinking he is a principal, may, on finding he is in truth an agent, sue the real principal, why should not the reverse hold good also? Why should not a man who contracts with another, thinking he is an agent, sue him when he finds out that he is the real principal? There seems to be no reason why he should not, provided the supposed agent has not expressly contracted as agent so as to exclude his liability as a principal party to that contract. It is to be remembered that in the present case the county court judge has found that the respondent did not give exclusive credit to the Finance Guarantee Company. If the view I have just expressed is correct this appeal must fail. It is not the ground on which the Divisional Court based their decision, but I think it is the law. I am sure it is justice. It is probably the law for that reason.

SANKEY L.J. I agree. The real question is, Did the appellant make a contract which would bind him personally? Upon that issue when it arises evidence of various kinds may be given and may have to be considered; first, documentary evidence; secondly, evidence of conversations and surrounding circumstances. A very important point is to whom credit was in fact given, but that is not the crucial or conclusive test. The question must be considered in the light of all the evidence, of which facts showing that credit was given to this person or that are matters of weight and importance. The facts to be considered are stated in the learned county court judge's note of the plaintiff's evidence as follows: "Heading said, 'I've got another job for you; meet me here to-morrow. I will show it to you.' Next day

I called at Kingsway House—Few days later—I went to 246 High Holborn, where the work in this action was afterwards done. Digby and three others showed me the work to be done. Two or three days later Heading told me what materials were to be used on the exterior of the building and several other details as to the inside. Digby ordered me to start the work. I mentioned it to Heading. Heading said, 'Quite all right; start the work.' On October 6 I gave a written estimate, 47*l.* 10*s.*, at the request of Heading and of Digby. I made out that estimate to the Finance Guarantee Company because I thought the work was for that company. I handed it to Heading or Digby. No comment passed on my addressing it to the Finance Guarantee Company. On October 14, 1926, I gave an additional written estimate for 40*l.* addressed to the Finance Guarantee Company. I handed it to Digby. No comment by Digby as to addressee." . . . . Subsequently the respondent found out that the Finance Guarantee Company had no interest in the work. He went and saw the appellant and said, "I look to you and Digby for payment as you both gave the order." Heading made no reply. Neither did he go into the witness box.

It seems to me that there was abundant evidence on which the county court judge could find, in answer to the first question, that Heading ordered or authorized the order for the work and labour in question. Then the fact has to be considered that the entries in the plaintiff's books show that he gave credit to the Finance Guarantee Company. With respect to this the judge finds that the plaintiff gave credit to the Finance Guarantee Company up to a certain date, but under a mistaken impression; and that he never gave exclusive credit to the company, i.e., in such a way as to bind himself to look to that company. Therefore in my opinion we can discount that element which is so important in other cases—namely, the giving of credit to a particular person. Heading ordered the work; while orders were being given relating to the place where and the manner in which the work was to be done, he stood by. That fact, if it stood alone, might appear to be neutral, but it takes a different colour from the further fact when the respondent said he would look to him for payment he made no answer. I think there was strong evidence on which the county court judge could find that the appellant contracted so as to make himself personally liable, and that the appeal should be dismissed.

ROMER J. I am of the same opinion. I think the judgment of the county court judge was warranted by his findings of fact and that they were justified by the evidence given before him. The learned judge put to himself a number of questions, and answered them. The answer to the first question was that the appellant ordered or authorized the order for the work and labour in question. The answer to the second question was agreed between the parties; it was that the appellant did not give or authorize the order exclusively as agent for the Finance Guarantee Company. That means that this contract was not within the category of contracts made by a party expressly as agent. The third question was, Did Heading (the appellant) expressly or impliedly undertake any personal liability for the work and labour? The answer is, "Expressly, No; impliedly, yes at all material times." In other words, just as he did not say he was an agent, so he did not say he was a principal. But in law he contracted so as to make himself prima facie liable personally. The order was given without any limitation of liability and an order so given would necessarily involve in liability the person giving the order. In my view the subsequent findings of fact upon the question to whom credit was given do not affect the position, because, the appellant having rendered himself personally liable, the respondent could have proceeded against him if he had been an undisclosed principal. Does it make any difference that at the time of the contract the respondent thought the appellant was acting for a principal? I should have thought not. If the respondent acting under that mistaken impression should say to himself, "In these circumstances I will give credit to the principal," is he, when he finds out his mistake debarred from saying he gave credit to the appellant? In my opinion he is not. That is the view which suggested the fourth question, "Did the plaintiff give exclusive credit to the Finance Guarantee Company until November 19, 1926?" The answer is, "The plaintiff gave credit to the Finance Guarantee Corporation up to a certain date, but gave such credit under a mistaken impression. He never gave exclusive credit to the Finance Guarantee Company, i.e., in such a way as to bind himself to look to that company." That means that he reserved to himself the right to have recourse to the appellant. I see nothing to prevent him from so acting, especially in view of the answer to the third question—namely, that Heading impliedly undertook personal liability at all material times. Then the answer to the fourth question means that the respondent gave temporary credit to the Finance Guarantee Company until he found they were not in any way concerned in the matter; but that he had not precluded himself from pursuing his remedy against the appellant when he found out the true state of the case. That finding shows that the contract was not a contract made with the appellant as agent and not otherwise. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *E. W. Essell.*
Solicitor for respondent: *F. H. Adams.*

W. H. G.

1928

March 30 ;
April 2.

AUCHTERONI AND COMPANY *v.* MIDLAND BANK, LIMITED.

[1927. A. 3653.]

Bill of Exchange—Banker—Bill accepted payable at Acceptors' Bank—Loan by Acceptors' Bank to Acceptors to meet Bill—Bill indorsed in Blank by Payee—Presentation of Bill for Payment by Servant of Payee—Payment of Bill by Acceptors' Bank over the Counter—Conversion of Proceeds of Bill by Payee's Servant—Liability of Acceptors' Bank to Payee—Negligence —Money had and received—Conversion of Bill—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 2, 8, *sub-s.* 3 *; s.* 34, *sub-s.* 1 *; ss.* 47, 53, 59.

The plaintiffs, a partnership firm at Liverpool, sold certain goods to the N. P. Company and drew upon the company a bill for a large amount payable in three months in payment for the goods. The N. P. Company accepted the bill payable at the defendant bank at Liverpool, where they kept their account. Shortly before the bill became payable the N. P. Company, who were then overdrawn at the defendant bank, asked that bank to order payment of the bill and charge to the account of the N. P. Company. The defendant bank were willing to act upon this advice because they had an arrangement for a running overdraft with the N. P. Company, and the bill was within the limits of that overdraft. When the bill became due it was brought by W., a servant of the plaintiffs, to a partner of the plaintiff firm, who, at W.'s request, indorsed the bill in blank. W., instead of taking the bill to the plaintiffs' bank for the purpose of collection through the Clearing House, presented the bill for payment over the counter to the defendant bank and received the money, which he then fraudulently converted and stole. The plaintiffs sued the defendant bank to recover the amount of the bill on the grounds of negligence, money had and received, and conversion of the bill. Evidence was given at the trial that there is an almost universal custom at Liverpool that trade bills should be presented through the Clearing House for payment to the bank at which they were accepted payable, but evidence was also given that presentation of such bills over the counter, though most unusual, was not irregular :—

Held, that the defendant bank were not liable to the plaintiffs : (1.) On the ground of negligence, because no privity of contract existed between the defendant bank and the plaintiffs, and the defendant bank owed no duty to the plaintiffs. (2.) On the ground of money had and received, because the drawing of the bill did not amount to an assignment in favour of the payee of funds of the drawee. In the present case the acceptors had no funds to meet the bill, which was paid out of a loan by the defendant bank, and the advice to pay the bill sent by the acceptors to the defendant bank gave no rights to the plaintiffs as against the defendant bank. (3.) The defendant bank were also not liable to the plaintiffs for the conversion of the bill, because the bill was a negotiable instrument, and they paid it in good faith without notice of any defect in title and in accordance with the law merchant. A bank was not bound to make inquiries merely because a bill indorsed in blank or an open cheque was presented for payment over the counter. According to the law merchant such presentation, although unusual, was always recognized as due presentation, sufficient to require the bankers to pay, in the absence of very special circumstances of suspicion, which were not present here.

Action tried before Wright J.

The plaintiff a partnership firm carrying on business at Liverpool, claimed to recover from the defendants, the Midland Bank, the sum of 876*l.* 9*s.*

The plaintiffs in the ordinary course of their business sold certain goods to a company called Nigerian Products, Ld., which also carried on business in Liverpool, and in payment for the goods so supplied the plaintiffs drew upon the company a bill for 876*l.* 9*s.* dated December 18, 1923, payable three months after date, and the company accepted the bill payable at the defendant bank, where they kept their account.

Nigerian Products, Ld., on March 18, 1924, three days before the bill fell due, notified the defendant bank that they had accepted the bill, which had been drawn by the plaintiffs, and asked the defendant bank to order "payment of the above and charge to the account of Nigerian Products, Ld." In fact the company was at that time overdrawn at the defendant bank, but the defendant bank were willing to act upon this advice and to pay the bill, because they had an arrangement with the company, whose credit was good, for a running overdraft, and payment of the bill would have been within the agreed limits of the overdraft.

On March 21, 1924, the bill being then due, a man named Woodward, who was the plaintiffs' cashier, brought the bill to one of the partners of the plaintiff firm and asked to have it indorsed, and the partner indorsed it in blank in the usual way. It was then the duty of Woodward to take the bill to the Bank of Liverpool and Martins, Ld., which was the plaintiffs' bank, and that bank would in the usual course have collected the amount of the bill through the Clearing House and credited the plaintiffs' account accordingly. Woodward however entirely departed from his duty. Instead of doing that which his duty required him to do, he took the bill, indorsed as it was in blank, and presented it himself over the counter to the defendant bank and took the money for the bill in short notes, that is to say, one of 500*l.*, two of 100*l.*, five of 20*l.*, and the balance in smaller notes or change. Having so received the money he fraudulently converted and stole it. Woodward also committed other frauds of a similar nature in which he adopted a similar procedure. The plaintiffs did not become aware of the frauds which had been committed by Woodward until the end of 1927, when he was tried and convicted and sentenced.

The plaintiffs then brought this action against the defendant bank, who were the acceptors' bank and not the payees' bank, to recover the amount of the bill. The action was based upon three grounds. The first head of claim was to recover damages for negligence, the second head of claim was for money had and received, and the third head of claim was in respect of the conversion of the bill.

Evidence was given at the trial that a number of acceptances, of which the plaintiffs were holders, amounting in all to twenty-six, had been dealt with by the defendant bank in eighteen years between September, 1906, and March, 1924. Each one of those acceptances had been paid by the defendant bank to the plaintiffs' bankers. It was not clear, however, in every case whether the plaintiffs had directly collected these bills through their bankers or whether some of the bills had not been discounted by them and collected on behalf of third parties who were in fact holders of the bills.

Evidence was also given with regard to the course of business in Liverpool in connection with the collection of bills. There is a Clearing House at Liverpool, and the custom, which was practically universal, was that trade bills, especially trade bills for so large an amount as the bill in question, should be presented to the bank at which they were accepted as being payable through the Clearing House. One witness gave evidence that in his twenty years' experience as a bank cashier and manager he had never known a bill such as that in question presented for payment in cash over the counter. He said that he did not know what he would have done in such a case, which to him was hypothetical; he might have asked some questions, but how far he would have pursued those questions would depend upon the humour he was in.

Certain bank officials were called as witnesses by the defendant bank, who also agreed that the presentation of a bill such as that in question over the counter for payment was most unusual. One witness said that in the eight years during which he had acted as cashier he had known six instances of that being done, but the banking witnesses called for the defendant bank, while admitting that the practice of presenting a bill for payment in cash over the counter in this way was unusual, took the view that it was the duty of the bank to pay, and that the bank had no right to make inquiries before paying, unless there was something very striking about the appearance of the individual who presented the bill for payment, as, for instance, if he were a postman, or a tramp, or an office boy, in which case the cashier would want to be satisfied that he was a responsible person likely to be in a position to receive payment in cash on behalf either of himself or of some one else. One witness said that he regarded such a presentation as unusual, but not irregular. Some of the witnesses considered that a cashier, when a bill of this kind was presented for payment over the counter, ought to refer the matter to the manager, but why he should do so, or what would be the result if the matter were referred to the manager, was left somewhat obscure.

Singleton K.C. and *Laski* for the plaintiffs.

A. R. Kennedy K.C. and *A. J. Hodgson* for the defendant bank.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

1928. April 2. WRIGHT J. [after stating the facts set out above] read the following judgment :—

The claim is somewhat peculiar, and indeed appears to be without any precise precedent. It is not brought against the acceptors, because it is not suggested, nor do I think it could be suggested, that the bill, which has been paid on behalf of the acceptors by the acceptors' bank at which it was drawn payable, was not paid on the payees' indorsement and was not discharged by such payment within the meaning of s. 36 of the Bills of Exchange Act, 1882. The present claim is brought against the acceptors' bank, which is not the payees' bank, and it is based on three grounds: the first claim is brought as for negligence, secondly as for money had and received, and thirdly as on a conversion of the bill.

The first head of claim, I think, is ill founded. A claim for negligence must be based on the ground of some duty binding the defendants to exercise care on behalf of the plaintiffs, which in a case such as the present can only arise from privity of contract. I need not multiply authorities for this principle. It is enough to contrast *Scholfield* v. *Earl of Londesborough*, (1) where it was held that the acceptor of a bill of exchange owed to the actual holder no duty to be careful that the bill should not be drawn so as to enable it to be fraudulently altered, because there was no privity of contract between them, with *London Joint Stock Bank* v. *Macmillan and Arthur* (2), where such a duty was held to exist between the drawer of a cheque and the drawee bank by reason of the fact that privity of contract existed between those parties, that is as between banker and customer. Lord Shaw thus expresses the principle referring to the latter case. He says (3): "In the first place, not only is this"—that is *Macmillan's* case (2)—"not a case between the drawer and the acceptor of a bill or between the acceptor and a holder of the bill in due course, but it is not the analogue of such a case. The reason that I state this in the forefront of my opinion is that it disposes at once of a considerable body of authority which was cited as relevant to the consideration of the present suit. My Lords, the distinction between a case of the latter sort and of the present was very clearly brought out in *Scholfield* v. *Earl of Londesborough* (1) by Lord Watson and by Lord Davey. In the words of the former, (1) which are directly applicable to the present case, 'The duty of the customer arises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future indorsees of a bill of exchange.'" In the present case no privity of contract existed between the defendant bank and the plaintiffs. The defendant bank owed a duty to the acceptors to honour the bill on due presentation, but no duty at all to the plaintiffs, and this head of claim must fail.

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(1) [1896] A. C. 514.
(2) [1918] A. C. 777.
(3) [1918] A. C. 823.

The second head of claim is, in my opinion, equally baseless. It is for money had and received; but by s. 53 of the Bills of Exchange Act, 1882, the drawing of a bill does not in England amount to an assignment in favour of the payee of funds of the drawee, still less of funds belonging to the acceptor in the hands of the acceptors' bank at which the bill is accepted payable. In the present case the acceptors had no such funds available at the due date, but the defendant bank were willing to lend sufficient funds to meet the bill, because the amount fell within the authorized limit of their overdraft. Even if I assume what was not proved, that is, that in due course after the bill was paid the acceptors provided sufficient funds, I cannot see how the plaintiffs can claim that such funds were provided for their benefit so that they can claim them as money had and received on their account. The defendant bank at no time notified the plaintiffs that they held or had received any money from the acceptors on the plaintiffs' account. In truth, if such funds were provided for the defendant bank by the acceptors they were provided to repay the loan which the defendant bank had granted to the acceptors by paying the bill of exchange on their behalf and by granting an overdraft loan for that purpose. I can see no justification in law for this head of claim. Apart from s. 53 of the Act I may refer to *Hill* v. *Royds*, (2) the principle of which applies a fortiori as between the plaintiffs as drawers and payees and the defendant bank as the acceptors' bank. The advice to pay the acceptance sent by the acceptors to their

(1) [1896] A. C. 537.

(2) (1869) L. R. 8 Eq. 290.

bank is an order solely between the defendant bank and the acceptors as their customers, and gives no right to the plaintiffs as against the defendant bank.

The third head of claim is that which was most strenuously pressed by Mr. Singleton for the plaintiffs, and is based on conversion. Woodward, the fraudulent servant of the plaintiffs, beyond question converted the plaintiffs' bill of exchange to his own use, because he used it to collect the proceeds to his own use in fraud of his employers. The defendant bank, however innocently, also converted the plaintiffs' bill as a chattel, because they exercised a dominion over it adverse to the plaintiffs. The plaintiffs did not intend to part with the bill of exchange except upon receipt of payment. The defendant bank, having paid the proceeds to Woodward, took the bill, and held it subject to their lien as against their customers, the acceptors, for the amount they had lent upon it. If they had paid the bill out of funds of the acceptors in their hands it may be that they would have held the bill of exchange simply on behalf of their customers, who would be entitled to hold it as against the payees as a bill discharged by payment, that is as a voucher and a proof of payment. In fact the defendant bank held the discharged instrument in their own right as against their customers in virtue of their lien for the money advanced in order to pay it. In any case they exercised a dominion over it adverse to the plaintiffs, and that would be a conversion as against the plaintiffs on principles analogous to those stated by Scrutton L.J. in *A. L. Underwood, Ld.* v. *Bank of Liverpool.* (1) But the defendant bank say that however true this might be if it were a case of an ordinary chattel, it is not true in the present case, because the bill was a negotiable instrument, and they dealt with it in good faith and for value, in accordance with the law merchant, and are not liable for conversion. They rely upon s. 59 of the Bills of Exchange Act, 1882. As the bill was in fact discharged by payment by the defendant bank, who paid simply as agents for the acceptors, and being so discharged ceased to be negotiable

(1) [1924] 1 K. B. 775, 790.

under s. 36 of the Act, I do not think that the defendant bank became holders for value of the bill under s. 27, sub-s. 3, of the Act; but in any case even if the statutory words do not apply to protect them they are entitled, subject to what I discuss below, to the protection of the general principles applicable to negotiable instruments. The bill bore the genuine indorsement of the payees; that indorsement was in blank, and the bill became a bill payable to bearer: see s. 8, sub-s. 3, and s. 34, sub-s. 1, of the Bills of Exchange Act, 1882. But by s. 2 "bearer" means the person in possession of such a bill, and that was in fact Woodward, to whom the defendant bank paid the bill, and indeed, as I have said, it was not contended that the bill was not duly discharged.

The plaintiffs, however, contend that the defendant bank are not entitled to rely upon this answer to the claim for conversion, because they say that the defendant bank were so put on inquiry that they cannot rely on the defence that they paid the bill in good faith and without notice of any defect in title. The plaintiffs rely on the contention that the presentation of such a bill over the counter was so unusual as to put the defendant bank on inquiry and to prevent them from saying that they paid in good faith. Mr. Singleton relied on dicta cited in the opinion of the Privy Council in *Commissioners of Taxation* v. *English, Scottish and Australian Bank* (1), where the question is considered "whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry," and further to the discussion in *Underwood's* case (2), where it was held that the defendant bank, which was in that case the collecting bank, should have made further inquiries before collecting the cheques. But in these cases the question was not whether the bank acted in good faith and without notice, but whether they acted without negligence—namely, in breach of the statutory duty established in the case of banks collecting crossed cheques for a

(1) [1920] A. C. 683, 688.

(2) [1924] 1 K. B. 775.

customer. It is, in my judgment, necessary most carefully to distinguish such a case, where the question is one of negligence, from a case like the present, where there is no duty to exercise reasonable care in favour of the plaintiffs. Sect. 90 of the Act is as follows: "A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not." The question therefore is whether the bank had notice of such facts as to debar them from saying that they acted in good faith and without notice of any defect in title. Mr. Singleton contended that there was such a departure from the usual banking practice involved in the presentation of a commercial bill such as that in question for payment over the counter, especially having regard to the amount, that the defendant bank could not be heard to say that they were not put on inquiry and that they could not pay without wilfully closing their eyes to the realities of the position. The guiding principle has been often stated. I may refer in particular to the words of Lord Herschell in *London Joint Stock Bank* v. *Simmons*. (1) He says: "In any other case the tribunal must investigate the facts for itself and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value. One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry." In the present case the evidence shows, as I find the facts, that the payment of a bill of exchange such as this and for this amount over the counter instead of through the Clearing House, or at least through the holder's banker, is very infrequent and is very unusual, but such cases do occur. I do not attach any importance to what is relied on as the course of business with regard to other bills held by the plaintiffs and accepted payable at the defendant bank, and in fact paid through the Clearing House. Such cases were spread over a long period of years, and were, I find, too infrequent to create any definite course of business, apart from the fact that there was nothing to show whether the plaintiffs were the actual holders. But the crucial consideration here is that the defendant bank had presented to them for payment a bill of exchange, complete and regular on its face, and indorsed in blank by what the cashier knew to be the plaintiffs' genuine indorsement. The holder of such a bill was entitled prima facie to payment there and then across the counter, just as if it were an open cheque. Sect. 47 of the Bills of Exchange Act provides that " a bill is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained." The question of what a bank should do when a bill is presented for payment in cash over the counter was discussed in *Bank of England* v. *Vagliano Brothers*. (1) In particular I desire to apply to the facts of this case as I find them the language of Lord Selborne (2), where he says this: " But it was insisted that in paying these bills as they did the bank deviated from the proper course of business, and ought to be held affected with notice that the indorsements were fraudulent. The first point relied upon for that purpose was, that the bills, drawn as they were for large sums, were all presented and paid across the counter and not through any bankers. This was admitted to be 'unusual' in the evidence for the bank; but it was not, as I read the evidence, either admitted or otherwise proved that it was irregular or sufficient in itself to excite a suspicion that there was something wrong, although it was unusual in the sense of not often happening. No authority was produced to show that it was irregular according to the law merchant; and if not, and if the payments were bona fide made, without any actual suspicion on the part of the officers of the bank, I cannot think it enough to defeat their right to

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(1) [1892] A. C. 201, 221.

(1) [1891] A. C. 107.

(2) [1891] A. C. 127.

charge the plaintiffs with those payments that they did not take a precaution not required by the law merchant, and on which they could not have insisted without the risk of the bills being treated by bona fide holders as dishonoured." I may also refer to the language of Lord Macnaghten in the same case (1), where he says: "Bankers who undertake the duty of paying their customer's acceptances cannot do otherwise than pay off-hand, and, as a matter of course, bills presented for payment which are duly accepted and regular and complete upon the face of them." In truth, if the plaintiffs' contentions were accepted on this point, no bank could ever without risk pay any open cheque for any considerable sum over the counter, or any bill of exchange, without making inquiries. If I thought a bank could not pay without making inquiries I should not be influenced by considering whether the inquiries made would be likely to elicit any helpful result, but I do not think a bank can properly be held bound to make, in such a case, any inquiries merely because cash is asked for over the counter. It may be that the practice of presenting bills through the Clearing House or through bankers has become more general since the date of *Vagliano's* case, (2) although indeed the Clearing House in London at least had been established half a century or more before then. But the law merchant has always recognized such presentation as due presentation sufficient to require the bankers, in the absence of very special circumstances of suspicion, such as presentation by a tramp, or a postman or an office boy, to pay. To lay down any different principle and to treat that which is merely infrequent or unusual as irregular by the law merchant would be, I think, to make an inroad on the established rules of the law merchant without any sufficient ground. The bankers' evidence given in this case is not very illuminating, but in any event supports this conclusion. The defendant bank on the facts of this case had their customers' mandate to pay the bill. The bill was duly presented for payment in a manner authorized by the law merchant. There were no special circumstances of

(1) [1891] A. C. 157.

(2) [1891] A. C. 107.

suspicion except that payment was required in cash over the counter, and I think the defendant bank could not have refused to pay, or even have deferred making payment, without risking a breach of duty to their customers, the acceptors, because the dishonouring of the bill might have amounted to injuring their customers' credit and exposed them to an action for damages.

In my judgment the principles laid down in the House of Lords in *Vagliano's* case (1) as quoted above are as true to-day as in 1891. The real trouble has arisen here because the plaintiffs were unfortunate enough to have entrusted the indicia of title to the bill to their fraudulent clerk, and they ought not to be heard to complain that the bank in good faith have acted on those indicia and have fulfilled their duty in accordance with the rule of the law merchant. I think, therefore, that on all grounds the plaintiffs' claim fails, and there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Hall, Hawkins, Pimblott, Brydon & Chapman.*

Solicitors for defendants: *Gregory, Rowcliffe & Co., for Hill, Dickinson & Co., Liverpool.*

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(1) [1891] A. C. 107.

R. F. S.

C. A.
1928
March 15, 16;
April 3.

[IN THE COURT OF APPEAL.]

HARDIE AND LANE, LIMITED *v.* CHILTON AND OTHERS.

[1926. H. 3495.]

Trade Union—Association of Motor Manufacturers—Prices fixed by Association—Prohibition of Sales at other than fixed Price—Enforcement of Rule by "Stop List"—Agreement not to insert Name in Stop List on payment of Money—Legality of Agreement.

A trade association, which by its constitution is entitled to put on a stop list the name of a person who has infringed its rule forbidding the sale of articles at other than fixed prices, may, instead of doing this, lawfully adopt the more lenient course of asking the person to make, and for it to accept, a money payment by way of compromise. Money so paid to the association is not paid under duress and cannot therefore be recovered back.

Rex v. *Denyer* [1926] 2 K. B. 258 disapproved.

APPEAL from verdict and judgment in action tried by Avory J. and a special jury.

The facts, which are fully stated in the judgments, were shortly as follows:—

The Motor Trade Association, which was registered as a trade union, and of which the plaintiffs were members, was formed to protect the interests of motor manufacturers and traders by endeavouring to prevent agents from selling cars at prices other than those fixed by the Association. This rule was enforced by putting those contravening it on a "stop list," the effect of which was that no member of the Association would supply goods to those infringing the rule. Sometimes, however, the Association, instead of putting a person upon the stop list, allowed him to escape this by paying a sum of money towards the expenses of the Association and publishing an apology.

The plaintiffs, having sold a car at a price other than the fixed price, were communicated with on the subject and informed by the committee of the Association (of which one of the defendants was chairman, another was a member

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and the third was the agent of the committee who communicated with the plaintiffs on the subject) by letter that if they would pay 200*l.*, buy back the car sold at its list price, and insert a signed undertaking in the Association's journal, they would not be put upon the stop list. The plaintiffs agreed to do this, and they in fact sent a cheque which included 100*l.* as an instalment of the 200*l.*, the balance of 100*l.* being arranged to be paid three months later. Shortly afterwards, however, in *Rex* v. *Denyer* (1) the Court of Criminal Appeal decided that to obtain money by a threat of putting a person on the stop list was a criminal offence. Thereupon the plaintiffs declined to pay the balance of 100*l.* and issued a writ against the defendants alleging that they had conspired to obtain, and had obtained from the plaintiffs by duress, the money in question which, accordingly, they claimed to have repaid as damages, or, alternatively, as money had and received by the defendants to the use of the plaintiffs.

At the trial Avory J. directed the jury that for two or more persons to agree to obtain, or for one to obtain, money to which there was no legal claim, either for themselves or for a third person, by threats calculated to deprive a reasonable man of his voluntary power of action, was illegal. Upon that the jury found a verdict for the plaintiffs for 132*l.*, being the amount they had paid to the Association plus the estimate of their loss on a resale of the car which they had had to buy back.

The defendants appealed.

Sir Patrick Hastings K.C. and *St. John Field* for the appellants. There was no evidence of a conspiracy by the appellants to do an unlawful act, and Avory J. misdirected the jury upon the point. A threat to publish the respondents' name in the stop list, being done bona fide in protecting the trade interests of the Motor Trade Association, was not unlawful: *Ware & De Freville* v. *Motor Trade Association* (2); *Sorrell* v. *Smith* (3), and can give no cause of action to the

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(1) [1926] 2 K. B. 258.
(2) [1921] 3 K. B. 40.
(3) [1925] A. C. 700.

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respondents. As the appellants could lawfully have put the respondents' name on the stop list, they were equally entitled to say that they would do so; and, again, they were entitled to say that they would adopt the more lenient course of giving the respondents the option of paying a sum of money in lieu of being put upon the stop list. To contend that offering such an option and asking for payment of a sum of money is demanding money with menaces, without any reasonable or probable cause, is an untenable argument. *Rex* v. *Denyer* (1) no doubt lays down the contrary, but that case was wrongly decided, and, moreover, is not binding upon this Court. The Court of Criminal Appeal is not a Court of co-ordinate jurisdiction with the Court of Appeal. As is said in Anson's Law and Custom of the Constitution, 3rd ed., vol. ii., The Crown, Part II., p. 266, the Court of Criminal Appeal "is a new appellate Court constituted within the King's Bench Division"; in other words, it is to be treated as a Divisional Court.

Sir Henry Slesser K.C. and *Harold Simmons* for the respondents. Although the Motor Trade Association has by its constitution power to put a member infringing its rules on the stop list, it has no power, express or implied, to exact a money payment by way of compromise. The money was paid by the respondents under compulsion, for it was paid where there was no legal claim to it; it was extorted from the respondents. Avory J. rightly told the jury that if a person obtains money from another by threats calculated to deprive the person paying it of his power of action—in other words, by duress—the money so paid can be recovered back. *Rex* v. *Denyer* (1) merely laid down, on the construction of the Larceny Act, 1916, what had always been the common law—namely, that if a person obtains money from another by threatening him with unpleasant consequences if he does not pay, that is a criminal act. There is no inconsistency between that decision and that in *Ware & De Freville* v. *Motor Trade Association.* (2) The latter case does not affect this one. The truth of the statement threatened

(1) [1926] 2 K. B. 258.
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to be made if money is not paid is irrelevant to the question of the guilt of the person who demands money with menaces: *Reg.* v. *Miard* (1); so, too, is the legality of the act that will be done if the money is not paid: *Williams* v. *Bayley*. (2) The test is: was the money given by the respondents in circumstances which deprived them of their free will? If a person pays money not as a free and voluntary agent but under coercion, he can recover it back: *Cadaval* v. *Collins* (3) and other cases cited in Smith's L. C., 12th ed., vol. ii., pp. 407 et seq. If the contention that the appellants were entitled to offer to accept money from the respondents as a more lenient punishment for the infringement of the price list rule, where is the line to be drawn? Is the Motor Trade Association to be the judge of the leniency? Who is to say at what point a so-called lenient offer does not become transformed into a threat? In the absence of any provision authorizing the imposition of a fine for a breach of the rules, such a demand as that made upon the respondents is unlawful.

[SCRUTTON L.J. referred to the judgment of Mellish L.J. in *Fisher & Co.* v. *Apollinaris Co.* (4) as to compromises in criminal cases by the payment of money.]

There is nothing improper in a compromise if the parties are free agents and not compelled to make the payment by fear. Here there was evidence that the money was paid not freely but under an oppressive threat, and there was ample evidence that the three appellants were acting in concert in obtaining the payment from the respondents.

[They also referred to *Giblan* v. *National Amalgamated Labourers' Union* (5); and *Conway* v. *Wade*. (6)]

Sir Patrick Hastings K.C. in reply. The appellants merely did what the Courts have said they were entitled to do, provided they did it to further the trade interests of the Association, and it is obvious that this was their object. As to conspiracy, mens rea is essential where the thing done is not in itself illegal. Here there is no evidence of mens rea;

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(1) (1844) 1 Cox, C. C. 22.
(2) (1866) L. R. 1 H. L. 200.
(3) (1836) 4 Ad. & E. 858.
(4) (1875) L. R. 10 Ch. 297, 303.
(5) [1903] 2 K. B. 600.
(6) [1909] A. C. 506.

everything the appellants did, they were both legally and morally entitled to do.

Cur. adv. vult.

April 3. The following judgments were read :—

SCRUTTON L.J. This is an appeal from a refusal of Avory J. to withdraw the case from the jury and enter judgment for the defendants.

The facts are these: An Association called the Motor Trade Association is registered as a trade union. Its objects are to protect the interests of motor manufacturers and traders. One of the matters it endeavours to deal with is to prevent the agents who sell cars for manufacturers from selling cars either above or below the manufacturers' list price. To sell below the list price, if done by competing agents, disturbs the manufacturers' system of regular prices and of agency, as does selling above the list price in times of scarcity of cars. The Association endeavours to enforce the list price, by putting those who contravene it, whether members of the Association or not, on a stop list. The effect of being on this stop list is that no member of the Association will supply goods to the named person, or to any one who supplies him with the protected goods. The legality of this system, even against a non-member, was determined by the Court of Appeal in *Ware & De Freville* v. *Motor Trade Association* (1), and this decision was approved by the House of Lords in *Sorrell* v. *Smith*. (2)

Hardie & Lane, Ld., were a firm of motor agents who had been members of the Motor Trade Association for some years. Its directors were Captain Hardie and Captain Lane. Captain Hardie said that he knew the objects of the Association were to prevent alteration of list prices by agents, and to promote fair dealing in the trade. He joined them for that reason, and because in some cases he could get a better trade discount by doing so. He knew that people were put on the stop list for selling at prices different from the list price, and he was anxious that such a system of underselling should

(1) [1921] 3 K. B. 40.

(2) [1925] A. C. 700.

be stopped. He knew also that sometimes the Association instead of putting a man on the stop list who had broken their rules, allowed him to escape it by paying a sum of money towards the expenses of the Association, and publishing an apology. He recognized that the latter was a more lenient course than putting on the stop list, which was very serious.

Under these circumstances, Captain Hardie sold to an agent of the Association who was sent to find out if he was keeping the rules about list prices, or, as he said, to trap him, a car for less than the list price, by taking the full list price, but including in the consideration for it, a full year's tax, about 9*l.*, and some minor matters. Captain Hardie admitted that when he sold the car in this way, he knew that if he was found out he might go on the stop list, but thought he might only be warned. He was called before the stop list committee of the Association, with notice of the charge against him, and the committee informed him by letter dated March 18, 1926, that if he would pay 200*l.*, buy back the car sold at its list price, and insert a signed undertaking in the Association's journal, he would not be put on the stop list. He assented on March 22, but got the fine altered to payment in two instalments. On March 24 he sent the Association a cheque for 332*l.*, being 225*l.* for purchase of car, 7*l.* cost of undertaking, and 100*l.* the first instalment, the balance to be paid in three months.

In the summer the case of *Rex* v. *Denyer* (1) was reported, in which the Court of Criminal Appeal decided that to obtain money by threat of putting a person on the stop list was criminal. The plaintiffs thereupon declined to pay the last instalment, and on October 28, 1926, issued a writ against John Chilton, Harry Arnold Bennett, and Percy Ingram Denyer and the said John Chilton, Harry Arnold Bennett, Percy Ingram Denyer sued on their own behalf and on behalf of all other members of the Motor Trade Association. Of the persons named, Denyer was the agent of the stop list committee who had communicated with the plaintiffs. Chilton and Bennett were probably selected as defendants

(1) [1926] 2 K. B. 258.

and representatives because in a writ issued on July 17, 1926, their names had been selected to sue as members representing the Motor Trade Association on behalf of themselves and all the other members of the Motor Trade Association for the second instalment of 100*l*. This action was discontinued, and on June 29, 1927, the Motor Trade Association, as sued in the names of representative members, was struck out of the present action by the Court of Appeal on the ground that the fluctuating members of the Motor Trade Association had not the same interest so that any member could represent them, and that the Motor Trade Association being a trade union, could not be sued in tort: see *Hardie & Lane* v. *Chilton*. (1)

As a matter of fact, Chilton was the chairman of the stop list committee. All that was proved about Bennett was that he was believed to be present at one meeting of the stop list committee, and that his name was put as a representative member on the first writ. The causes of action in the writ were: damages for conspiracy; damages for deceit; money had and received by the defendants to the use of the plaintiff; damages for breach of agreement; damages for libel contained in a journal called Motor Commerce, dated March 27, 1926.

In the statement of claim the allegation of conspiracy was expanded into an allegation that Chilton, Bennett and Denyer entered into a conspiracy "to obtain money fraudulently and by duress from the plaintiffs without any consideration." The allegation of fraud was abandoned at the trial, and the allegation "without consideration" was obviously unsupportable in view of the fact that the money was paid to procure that the plaintiffs should not be put on the stop list, a most valuable consideration. The case therefore resolved itself into an allegation of conspiracy to obtain money by duress occasioned by the threat, menace or intimation that the plaintiffs would be put on the stop list if the money was not paid, and could escape being put on the stop list if the money was paid.

(1) [1928] 1 K. B. 663 [there wrongly given as *Chiltern*].

Conspiracy as a cause of action exists either when the end aimed at by the agreement is unlawful and causes damage, or the means by which a lawful end is pursued are unlawful and cause damage. An agreement is not actionable when neither the end nor the means is unlawful.

In the present case an agreement to protect trade interests by refusing to supply a trader departing from fixed prices with any goods, either directly or indirectly, and announcing that refusal by putting his name on a stop list, has been held legal by this Court in the case of *Ware & De Freville* v. *Motor Trade Association* (1), as approved in the case of *Sorrell* v. *Smith* (2) by the House of Lords, although it causes damage to an individual, if it is done in reasonable protection of trade interests, as was found to be the case. If the action of putting on the stop list is lawful, it is not unlawful to say you are going to do it. In *Sorrell* v. *Smith* (2) the Lord Chancellor (Lord Cave) said (3): "I deduce as material for the decision of the present case two propositions of law, which may be stated as follows: (1.) a combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2.) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues," and again (4): "The second proposition"—which I have just read—"of course assumes the absence of means which are in themselves unlawful, such as violence or the threat of violence or fraud. Your Lordships were asked to say that a threat to withdraw custom or supplies falls within this category, and of itself introduces an element of illegality; but although there are passages in the books which appear to support that contention, it did not appear to me that the contention was made good. If a trader may withdraw his custom without breaking any law, he may with equal legality express his intention of withdrawing it unless his wishes are met, subject always to the condition that the purpose of the threat is to forward his trade interests and not wilfully and ultroneously to injure the trade of another." And he refers to certain authorities. Lord Dunedin in the same case says (1): "Expressing the matter in my own words, I would say that a threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal action or an illegal, i.e., a tortious action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established."

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(1) [1921] 3 K. B. 40.

(2) [1925] A. C. 700.

(3) [1925] A. C. 712.

(4) Ibid. 714.

I adopt the language of Holmes J. in *Vegelahn* v. *Guntner* (2), that the unlawfulness of "threats" depends on what you threaten, and of "compulsion" on how you compel. Atkin L.J. expresses the same point in *Ware & De Freville's* case (3), where he says: "What is meant by coercion? If it means no more than procuring a person to do what he does not want to do, it covers many cases where no cause of action can be suggested to exist. The use of parental rights, the use of rights of property, the deprivation of social advantages, may be so applied as to make it plain to the person affected that he must yield or be ruined. A necessary servant or agent may compel advantages to himself or herself by offering as an alternative the withdrawal of his or her services; and in the same way may compel disadvantageous treatment of third parties. I conceive that the logical mind of Cave J. on his view of the law was working on lines of necessity in accepting the view that if the cook says to the master: 'Discharge the butler or I leave you,' and the butler is consequently discharged, the cook is liable to an action. Yet the decision in *Allen* v. *Flood* (4) repudiates this view. In my opinion the wrongfulness of the inducement applied to the third person cannot depend upon its weight. Coercion therefore cannot simply mean successful or even inevitably successful inducement. I am satisfied myself that it means nothing at all on a question of tort except in reference to the means

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(1) [1925] A. C. 730.

(2) (1896) 167 Mass. 92.

(3) [1921] 3 K. B. 40, 81.

(4) [1898] A. C. 1.

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employed." There is also an excellent passage in the judgment of Peterson J. in *Hodges* v. *Webb* (1) to the same effect.

I take it therefore to be clear law that if it is lawful to put a man on the stop list for breaking a rule, to say that you are going to put him on the stop list when he has broken that rule, cannot be illegal at common law. And I am quite unable to understand how it can be illegal to say "I could lawfully put you on the stop list, but if you will do something which is not illegal, and is less burdensome to you than the stop list, I will not exercise my power." For instance, the Motor Trade Association has no express power to demand an apology, or undertaking for future conduct, from a member who undersells, but it seems to me impossible to say that a statement that such a member will go on the stop list unless he apologizes or gives an undertaking for the future is a threat to do an illegal act, or a threat which is itself unlawful. And though the Motor Trade Association has no express power to ask for money as a more lenient alternative to the stop list, which the plaintiffs admit it to be, it appears to have the ordinary power of any individual of compromising a dispute which involves no criminality, only breach of rules. A member of a club after dinner in a row damages some club property. He is told he is liable to expulsion, but that the committee will not enforce it if he makes good the damage. Are the committee conspirators who have obtained money, or money's worth, by threats, which can be recovered by the member?

In *Fisher & Co.* v. *Apollinaris Co.* (2) Fisher was prosecuted for unlawfully using the company's trade mark. The prosecution was abandoned on an agreement by Fisher to give an apology which might be published. Fisher afterwards endeavoured to stop publication on the ground that the apology was obtained under duress of the criminal prosecution. Mellish L.J. says (3): "Such compromises are constantly made before criminal Courts in cases of assault or libel. In some cases there is a payment of money; in other cases,

(1) [1920] 2 Ch. 70, 87-90.
(2) L. R. 10 Ch. 297.
(3) L. R. 10 Ch. 303.

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no payment at all; and it has never been considered that there was anything wrong in such transactions. It would, of course, be different if there was any case alleged of extorting money under threats."

All compromises of proceedings are induced by the desire to avoid the continuance of proceedings which will go on if the compromise is not arrived at, but there is nothing illegal in agreeing to do a legal act, to avoid action which the other party may legally take.

Where the end or means are illegal, the case is, of course, different. It was thought to have some bearing on the case below to introduce Dick Turpin's "Your money or your life." This expanded is "I will murder you"—(Crime No. 1)—"if you do not allow me to rob you" (Crime No. 2). What possible relevance this can have to a statement "I will not do an act I may lawfully do, if you will do an act you may lawfully do, but I shall do my act if you do not do your act," I cannot understand. I regret that I did not add to my list of question-begging epithets in *Ware & De Freville's* case (1) "Dick Turpin" and "highwaymen." The learned judge below during the opening argument asked on the first day: "Is there any authority that you know of which establishes this proposition—that if a person having a legal right to do something threatens that he will exercise that right unless the other pays a sum of money, that affords no cause of action?" The passages cited above seem to me clear authority for the proposition. But any number of cases in real life would show its truth. A. has land facing a new house of B.'s. A. proposes to build on that land a house which will spoil the view from or light to B.'s house and depreciate the value of his property. B. implores A. not to build. A. says: "I will not build if you pay me 1000*l.*, but I shall build if you do not." B. pays the money and A. does not build. Could it be seriously argued that B. could recover the money back as obtained by threats? A valued cook comes to her mistress and says: "Raise my wages by 20*l.* a year or I shall give you notice." The mistress foreseeing, and much disturbed in mind by, the tragedy that the loss of the cook would involve, pays the money. Can she recover it as obtained by threats? And examples innumerable could be quoted.

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(1) [1921] 3 K. B. 40.

Cases involving agreements to abstain from prosecution in a matter of public interest if money is not paid, are obviously different. To know of a felony and not to inform the King's officers, is misprision of felony; an agreement not to prosecute for a misdemeanour of a public character is void as contrary to the public interest and an agreement to combine to obtain money by an agreement not to prosecute would have both an unlawful end and be obtained by unlawful means. The learned judge below carefully directed the jury in considered terms, which I refer to, but do not read in full. I shorten this, I hope accurately, into a direction that either for two or more to agree to obtain, or for one to obtain, money to which there is no legal claim, either for themselves, or for a third person, by threats calculated to deprive a reasonable man of his voluntary power of action, is illegal. In my opinion this direction is wrong in the following respects: (1.) Where the money is not legally due without an agreement, but is due under an agreement obtained by the threat to do an act which may be lawfully done, if the agreement is not made, both the agreement and the threat are lawful; the direction would make them unlawful. If the agreement is unlawful, or the threat inducing it is to do an unlawful act, the case would be different. In the present case it was lawful to put a member who broke the rules on the stop list; it was lawful to say one was going to do it; it was lawful, or not unlawful, to agree not to exercise the legal right to put a man who broke the rules on the stop list, if a more lenient alternative in the shape of a payment of money was exercised; (2.) which is a minor form of the same point, in my opinion the direction is wrong if it assumes that to threaten to do what you have a legal right to do can ever be a ground for obtaining back money alleged to be paid under duress. A man lawfully claims a lien on property of which you are in urgent need; because of your urgent necessity you pay, the necessity disturbing your power of judgment. Is it suggested you can recover the money back? To do so, you must prove the lien unlawful. A judge tells a prisoner who has stolen that if he makes restitution his sentence will be lighter; terrified by the prospects of a heavy sentence the prisoner makes restitution. Can he obtain the property back as paid under duress? (3.) It appears to be clear at common law that duress to goods does not avoid an agreement: see per Lord Denman in *Skeate* v. *Beale*. (1) It is difficult to see therefore how a threat not to supply goods can be a valid ground of duress. Money paid under duress of goods can only be recovered in an action for money had and received, if the detention of the goods or refusal to supply them was illegal. But forbearance to do an act you have a legal right to do is good consideration for an agreement otherwise lawful: see *Jones* v. *Ashburnham*. (2)

It follows from these reasons: (1.) that the judge below should have withdrawn the case from the jury because the evidence only showed an agreement to forbear from doing a legal act—namely, putting the plaintiffs on the stop list, if the plaintiff would do an act which was not unlawful, i.e., to pay money which the plaintiff might legally pay, and the Association legally receive, and such an agreement was not a conspiracy, there being neither unlawful end nor unlawful means, and there being therefore no evidence of lack of reasonable and probable cause for the demand. (2.) That there was no case of obtaining money by duress, because the only duress was a threat in effect not to supply goods, and such a threat could not legally be held to deprive any reasonable man of his voluntary power of action or constitute any ground for twelve reasonable men making such a finding. Indeed all Captain Hardie said was that he was frightened of being put on the stop list and he paid the money to avoid going on the stop list—"it was better than going on the stop list." Persons who have broken rules and know it are often frightened of the consequences; but when the consequences are not unlawful an agreement to avoid them by doing something not itself unlawful is not illegal. (3.) In my opinion also there was no evidence that Bennett was a party to any agreement, good or bad; and I doubt whether there was any as to Chilton; but the first two reasons are enough to justify the Court in setting aside the present judgment. It is to be noted that the plaintiffs themselves put in the answers to interrogatories of Chilton and Bennett, which state that neither of them knew of or authorized or sanctioned the visit of Neale to the plaintiffs; that neither of them published or was responsible for "Motor Commerce," and that neither of them received any money from the plaintiffs, it being entirely a Motor Trade Association matter.

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(1) (1841) 11 Ad. & E. 983. (2) (1804) 4 East, 455.

I think it better to say something about the case of *Rex* v. *Denyer* (1), decided after the House of Lords had, in *Sorrell* v. *Smith* (2), upheld the legality of the stop list, as decided by the Court of Appeal in *Ware & De Freville's* case. (3) In that case the Court of Criminal Appeal held that it was criminal to obtain money for the Association by a threat of putting on the stop list. The statute contravened was said to be the Larceny Act, 1916, s. 29, sub-s. 1, making punishable with penal servitude for life any knowing uttering of a letter demanding of any person with menaces and without any reasonable and probable cause any valuable thing. On this I would remark that the language of the statute shows that you may demand a valuable thing with menaces with reasonable and probable cause without committing any offence; and the most obvious reasonable and probable cause appears to me to be where you have a legal right to do the thing which you threaten to do, assuming that the obtaining of the valuable thing thereby does not involve any criminal act, as an agreement not to prosecute or not to inform the authorities of a felony. In *Ware & De Freville's* case (3) the firm put on the stop list was not a member of the Association, and had received an offer that if they paid a donation to a trade charity, gave an apology not to be published, and an undertaking not to break the rules in future, they would not be put on the stop list. They refused, and were put on the stop list. The conditional threat was not treated by the Court of Appeal or the House of Lords as having any effect on the legality of the transaction.

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(1) [1926] 2 K. B. 258.
(2) [1925] A. C. 700.
(3) [1921] 3 K. B. 40.

In *Rex* v. *Denyer* (1), the menace was to put a person not a member on the stop list; i.e., not to supply him with goods; both legal acts; in the present case the person was a member of the Association, who had broken the rules, thereby rendering himself liable to be put on the stop list, though there would be nothing contrary to the public interest in not putting him on the stop list. Under such circumstances, it appears to me clear that a person menacing, or stating that he would do an act he had a legal right to do, and compromising the menace by an agreement to substitute a more lenient and not unlawful penalty, was guilty of no criminal offence against the Larceny Act. In my opinion *Rex* v. *Denyer* (1) was wrongly decided. There was no evidence upon which a jury could find want of reasonable and probable cause; no evidence of any menace constituting a crime, and the judge should, as in this case, have withdrawn the case from the jury. I am not saying that there may not be cases where a threat to do an act not unlawful may come within the statute, though I find it difficult to imagine them. Generally, where the threat is to make public something which it is not desired to publish, but which is true, the publication may be good cause for a criminal prosecution for libel, on the ground that, though true, it is not for the public interest to publish the defamatory statement which may lead to a breach of the peace. Cases of this class may afford evidence of lack of reasonable and probable cause.

Before coming to this conclusion I have, of course, carefully considered the reasons given for the judgment in *Rex* v. *Denyer*. (1) The section in the Larceny Act, after the general sub-section acted on in *Rex* v. *Denyer* (1) contains sub-sections dealing with threats to accuse of specified crimes of a serious character (sub-s. 3) which in clause (*b*) of sub-s. 2 is enlarged into "any felony." Crimes not coming within these sub-sections must be dealt with under sub-s. 1 which limits the menaces or demands to those made "without reasonable and probable cause," a provision omitted from the other sub-sections. As I have pointed out, this assumes that there may be reasonable and probable cause for demanding money for not accusing of criminal acts, and the trade mark prosecution in *Fisher & Co.* v. *Apollinaris Co.* (1) would, with its compromise, be an example of such a case. Sub-s. 4 is not very intelligible. As some of the sections make accusation of crime the offence it is not quite clear why it is immaterial whether the threats are of accusation. I suppose the sub-section means that it is not necessary that the threat be of violence, or personal injury to goods, injury meaning unlawful damage, and that there may be criminal threats which are not to accuse; but they must, in my opinion, be threats to do an unlawful act.

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(1) [1926] 2 K. B. 258.

The Lord Chief Justice in *Rex* v. *Denyer* (2) obviously recognized that some remarks of members of the Court in *Ware & De Freville's* case (3) were contrary to the view he was expressing, but he thinks they were obiter dicta. As the case was one of a threat to put on the stop list if money was not paid, put into execution when money was not paid, I do not think the remarks were obiter; anyhow, I think they were right. I selected the case of a proposal to abandon a libel action, which otherwise would be prosecuted, if money was paid to a charitable institution. The Lord Chief Justice says the case is one, ex hypothesi, in which the person making the claim has a money claim, sounding in damages. What does this mean? The plaintiff in the libel action may be making a claim which in the opinion of the jury will fail, but he has a legal right to compromise it by accepting a payment of money. Does not the Lord Chief Justice's remark show that a threat to do what the claimant has a right to do—proceed with the action—does not invalidate or render criminal a proposal to settle that claim by payment of money, with a threat to proceed if the money is not paid,

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(1) L. R. 10 Ch. 297.
(2) [1926] 2 K. B. 258.
(3) [1921] 3 K. B. 40.

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which is contrary to what the judgment is saying. The quotation from *Rex* v. *Dymond* (1), is directed to saying that belief that the person threatening has reasonable and probable cause for threatening is no justification for threatening if in fact the belief is erroneous, and does not deal with the, to me, more obvious positions that if there is no evidence on which a jury could find lack of reasonable and probable cause, in that the act threatened is all which the defendant had a right to do, the judge should withdraw the case from the jury, and that such a case is where the threatener has a legal right to do what he threatens. The Lord Chief Justice states the proposition which this judgment rests on, and says: "That proposition is not merely untrue; it is precisely the reverse of the truth." (2) I can only say I think the proposition is, for the reasons given in this judgment, true, and supported by the judgments of the House of Lords, and to me at any rate obvious. The Lord Chief Justice says it is an excuse which might be offered by blackmailers to an indefinite extent. I cannot understand this. The blackmailer is demanding money in return for a promise to abstain from making public an accusation of crime. The very agreement is illegal, even if the crime of a certain class has been committed. A man has no right to suppress his knowledge of a felony. How can this be analogous to proposing not to do a thing which you have a legal right to do, if money is paid you, there being no public mischief in the agreement? I do not understand the next sentence, about "nexus or relationship." Supposing the person threatened with the stop list himself says, before any demand of money: "If you will not put me on the stop list I will pay 100*l.* to any charity you select, and give an undertaking not to break the rule in future," would there be anything illegal in accepting the offer, and would not there be the closest "nexus or relationship" between the offer and the consideration for which it is offered? Does it then make any difference which side the proposal comes from?

Lastly, the judgment quotes a passage in the summing up

(1) [1920] 2 K. B. 260, 265. (2) [1926] 2 K. B. 258, 268.

of Talbot J.: "A person has no right to demand money, according to the Act of Parliament, as a price of abstaining from inflicting unpleasant consequences upon a man." This, as expressed, is inaccurate, as it would include the cases I have put above of damaging a man's property, or light, or view unless he pays money, or the cook's giving notice. Its inaccuracy is in not excepting the cases where the man has a legal right to inflict unpleasant consequences; in that case there is no evidence of want of reasonable and probable cause to go to the jury, and there is nothing illegal in the agreement to abstain from inflicting such consequences for a money consideration. In truth the judgment in *Rex* v. *Denyer* (1), however well intentioned, would make the case of members of trade associations who break the rules of their associations much worse than it is at present. They would no longer be able to avert the agreed consequences of their breach of rules by accepting the offer of a money payment, though they consider it more lenient than the agreed consequences. Anyhow, they can in future avert evil consequences by not knowingly breaking the rules of the associations of which they are members.

In my opinion the judge below should have withdrawn this case from the jury on the ground that there was no evidence of any lack of reasonable and probable cause to go to the jury, no illegal demand of money, or any evidence of duress—and the appeal must therefore be allowed, and judgment entered for the defendants with costs here and below. In any event there would have had to be an order for a new trial, as the judge, in the respects I have mentioned, in my opinion misdirected the jury as to the law.

SANKEY L.J. In this case the plaintiffs sued the defendants for damages for conspiracy, and, alternatively, for money had and received by the defendants to the use of the plaintiffs, upon the ground that the money in question had been obtained from them by the defendants by duress.

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(1) [1926] 2 K. B. 258, 264.

The action was tried by a judge and jury and at the conclusion of the plaintiffs' case, the defendants submitted that there was no case to go to the jury. The judge overruled the objection, whereupon the defendants elected to call no evidence, the jury returned a verdict for the plaintiffs for 132*l.*, a sum arrived at after giving certain credits, and the judge gave judgment accordingly. From that judgment the present appeal is brought upon the grounds: (1.) that the learned judge was wrong in leaving the case to the jury, and (2.) that the learned judge misdirected the jury. The facts are as follows: The plaintiffs and the defendants are all members or officials of a society known as the Motor Trade Association. That is an Association composed of manufacturers, agents and dealers in motor cars formed with the object of encouraging and protecting the motor industry in the United Kingdom, and, as admitted by the plaintiff Hardie, of ensuring that all members of the trade should deal fairly with each other. It has a number of regulations and by-laws and it seeks to maintain and stabilize the price of motor cars. Its objects, amongst others, are referred to in clause 2 (*a*), which I need not read, and it has certain by-laws under which a stop list is created. It will be observed that there is no express power in the by-laws for the Association to take money in lieu of putting a person on the stop list. In January, 1926, it came to the notice of the Association that the plaintiffs had transgressed one of the rules of the Association by selling a motor car under price. In fact, they had been induced to do so by one, Neale, and one of the complaints in the statement of claim was that Neale acted in concert with the defendants and fraudulently induced the plaintiffs to enter into the above mentioned transaction, but this charge of fraud against the defendants was abandoned at the trial. In these circumstances, the defendants upon March 3, 1926, wrote the following letter to the plaintiffs: "Dear Sirs, As you are doubtless aware, this Association exists for the purpose of protecting the fixed prices of its manufacturer and concessionaire members, who desire that none of their goods be sold, offered or advertised above or below such fixed prices. We regret to have to inform you that facts have been brought to the notice of the Association with which your name is connected and which will be brought before the stop list committee of this Association meeting at this address on Wednesday the 10th instant at 11.45 A.M. Your attendance is invited and if you attend you will have an opportunity of hearing the case submitted in your presence and of making any answer or explanation which you may think fit to place before the committee. We think it proper however to inform you that should you not attend, the matter will nevertheless be inquired into in your absence and such recommendation made to the council as is deemed appropriate. We enclose précis of the case which will be placed before the committee. Yours faithfully, The Motor Trade Association." The two directors of the plaintiffs' company—namely, Captain Hardie and Captain Lane, attended the meeting of the stop list committee when the charge against them was investigated. They said that they had always tried to carry out the rules of the Association, but that the man, Neale, had pestered them into doing what they had done. On March 18 the defendants wrote to the plaintiffs the following letter: "Dear Sirs, With reference to your appearance before the stop list committee at their meeting on Wednesday, 10th instant, we beg to inform you the committee fully considered the evidence placed before them and came to the conclusion that the infringement of our recognized principles of price regulation alleged as already stated to you, was proved to their satisfaction. The committee under all the circumstances are prepared to recommend to the council that if you will pay a sum of 200*l.* to our indemnity fund (which is applied towards expenses) to mark your regret, sign and pay for the insertion of the enclosed undertaking in 'Motor Commerce,' also re-purchase the car purchased from you, that this shall be regarded on this occasion as a satisfactory ending of the matter. Please let us hear from you by Wednesday, 24th instant, if you agree, and in that event let us have cheques for 200*l.* and 225*l.* made payable to this

Association and the signed undertaking with a cheque for 7*l.* made payable to 'Motor Commerce.' If we do not hear from you by the day named, we will assume that you do not desire to avail yourself of this method of concluding the matter." The plaintiffs acknowledge the receipt of that letter and they say: "We are quite prepared to re-purchase the car in question immediately, but would respectfully submit that the fine of 200*l.* is extremely severe having regard to all the circumstances and we would be glad if you will kindly let us know by Wednesday next, the 24th instant, whether we may be permitted to appear again in person to appeal for a reduction of the fine." Captain Lane saw Mr. Denyer and it was agreed that he should pay 332*l.* at once and the balance of 100*l.* in three months. This was confirmed by the plaintiffs in their letter of the 24th and accepted by the defendants in their letter of March 25, the plaintiffs' letter being: "Dear Sirs, Confirming our Captain Lane's call to-day when he saw your Mr. Denyer, we enclose herewith our cheque for 332*l.*, this sum being made up as follows: Re-purchase of car, 225*l.*, cost of insertion in 'Motor Commerce' 7*l.*, the remaining 100*l.* being on account of the 200*l.* fine, the balance of which to be paid within three months from this date." In his evidence Captain Hardie said that he knew the stop list committee had been adopting a similar course in other cases, that he was afraid of being put on the stop list, and that he realized that to pay the fine and give the undertaking was a lenient alternative to going on the stop list. The defendant, Chilton, was chairman of the stop list committee, Bennett is a member of the Association, and Denyer is the secretary of the Association and wrote the letters.

On July 17, 1926, the defendants, Chilton and Bennett suing on behalf of themselves and of other members of the Motor Trade Association, issued a writ against the present plaintiffs for the balance of 100*l.* Meanwhile, however, the defendant Denyer had been convicted at the Exeter assizes under the Larceny Act, 1916, and his appeal against the conviction had been dismissed by the Court of Criminal

Appeal: see *Rex* v. *Denyer*. (1) The conviction was in respect of circumstances not dissimilar from the present ones. The plaintiffs therefore refused to pay the 100*l*. and brought the present action for damages, and, alternatively, for the return of the 332*l*. they had paid to the defendants. It was contended by the appellants that there was no evidence of any conspiracy, that none of the defendants had done anything illegal, that all they had done was to tell the plaintiffs what they, the defendants, were entitled to do, and would do, and to give the plaintiffs an option of paying a sum of money instead. On the other hand it was argued for the plaintiffs that the defendants were not entitled to demand money under coercion, and that it was immaterial whether the threat they made was a lawful or an unlawful threat, and they pointed out on appeal that the finding of the jury was that the threat deprived the plaintiffs of their voluntary power of action.

The first matter to be considered is, what are the circumstances which give rise to an actionable conspiracy. A conspiracy is defined in the Oxford Dictionary as being "a combination of persons for an evil or unlawful purpose." In my view, a conspiracy is actionable in law where it is an agreement by two or more persons to do an unlawful act or to do a lawful act by unlawful means. One of the means by which a conspiracy can be carried out is by making threats, and there again, threats may be lawful or unlawful. In *Sorrell* v. *Smith* (2) Lord Dunedin says (3): "A threat is a pre-intimation of proposed action of some sort. That action must be either per se a legal action or an illegal, i.e., a tortious action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceeding; if of the second, it falls within the description of illegal means, and the right to sue of the person injured is established." This makes clear the meaning of s. 29 of the Larceny Act, 1916, which deals with demanding money with menaces, and creates an offence where a person utters, knowing the contents thereof, any letter demanding of any person, with menaces and without any reasonable and probable cause, any property. That section clearly contemplates that there may be cases where there may be reasonable and probable cause for uttering a letter with menaces. Indeed, that must be so. Take for example the case of three persons who lend 1000*l.* without interest to a fourth person, and take a bond from him for repayment of the sum. Supposing the obligor refuses to repay and the three obligees meet together and write a letter to him threatening to bring an action unless he pays the money within a given time. That would be a case in which they would be demanding money with menaces, but with reasonable cause, and they could not be convicted under the section in question. There would be no evidence on which the judge could leave to the jury whether there was a lack of reasonable and probable cause, and he should withdraw the case from the jury. Suppose again the same case, but the obligees, after sending the letter in question, agreeing to compromise their claim for 500*l.* and demanding that sum. There again they would not be committing an offence within the section.

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(1) [1926] 2 K. B. 258.

(2) [1925] A. C. 700.

(3) [1925] A. C. 730.

Dealing now with the case before us, it must be admitted that since the decision of *Ware & De Freville* v. *Motor Trade Association* (1), the defendants' object was not an illegal one. The defendants in that case were this very same Motor Trade Association, and the plaintiffs were not members thereof, but it was held that the publication of the plaintiffs' name in the stop list was done by the defendants bona fide in the protection of the trade interests of the members of the Association, and therefore was not unlawful, and an injunction should not be granted to restrain them from doing so. Scrutton L.J. said (2): "It is the commonest transaction to say in a libel action: 'I will not issue a writ or ask for damages if you will apologise and pay my costs,' but I never heard it called 'demanding money with menaces' before," and again (3): "If you may lawfully do a thing it cannot be unlawful to say you are going to do it; if men may refuse to work for a master, they may surely tell him they propose to do so if he acts in a certain way." And further he says (1): "If so the question in this case is whether a combination (1.) intended to secure that new goods shall be sold at a fixed price, neither higher nor lower, by refusing to supply with goods a person who sells those goods at other than the fixed price; and (2.) to inform the confederates who such persons are by means of a stop list; and (3.) to take steps to insure that the person who is not to be supplied with goods directly is not supplied with them indirectly, is a reasonable and legitimate means of protecting trade interests. In my view it is."

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(1) [1921] 3 K. B. 40.
(2) [1921] 3 K. B. 64.
(3) [1921] 3 K. B. 69.

Starting, therefore, with the proposition that the defendants' object was not unlawful, and that the means by which they sought to attain it—namely, the threat and the stop list, were not unlawful, there is not any ground upon which the plaintiffs have an action for conspiracy so far. But it is said that they had no power to take money in lieu of putting the plaintiffs upon the stop list. I cannot think, however, that what they did with regard to taking money in the present case gives the plaintiffs an actionable right of conspiracy. It will be observed that Captain Hardie himself said that he realized that to pay the fine and give the undertaking was a lenient alternative to going on the stop list. There is no evidence that the fine itself was an excessive or extortionate amount. It cannot be maintained that the defendants had no right to forgo their full rights under the contract and to compromise their claim any more than that the obligees in the instance above given had no right to compromise their claim. In the case of *Fisher & Co.* v. *Apollinaris Co.* (2), the head-note, which correctly states the facts, is as follows: "The prosecutors in a trade mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months: *Held*, that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter." Mellish L.J. said (1): "But in my opinion, there is no objection to the compromise of a charge of this sort on such terms. The complaint was that Fisher had used the trade mark of this company. Now, previously to the Trade Marks Act (25 & 26 Vict. c. 88), the sole remedy for the wrong complained of by the company would have been by action at law or suit in equity, but under this Act the wrong became also the subject of a criminal prosecution. There was no authority for saying that it was wrong in the prosecutors to withdraw from such a charge of this kind. The prosecutors allowed him to state that his offence was not wilful, and accepted an apology. Such compromises are constantly made before criminal Courts in cases of assault or libel. In some cases there is a payment of money; in other cases, no payment at all; and it has never been considered that there was anything wrong in such transactions. It would, of course, be different if there was any case alleged of extorting money under threats." It is not necessary to speculate what may be the circumstances under which a conspiracy becomes actionable by reason of the unlawful means used to attain the object.

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(1) [1921] 3 K. B. 71.

(2) L. R. 10 Ch. 297.

In *Sorrell* v. *Smith* (2) Lord Dunedin said (3): "I entirely concur with what was said by Atkin L.J. in *Ware & De Freville* (4), 'It appears to me,' he says, 'to be beyond dispute that the effect of the two decisions in *Allen* v. *Flood* (5) and *Quinn* v. *Leathem* (6) is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another.'" It would not only be dangerous but impossible to lay down by anticipation a category of unlawful means, and it is not difficult to postulate circumstances in which even the Motor Trade Association might use unlawful means to carry out their object, but in the present case there is no evidence upon which it was possible to say that their object was unlawful, or that the means which they used to attain it were.

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(1) L. R. 10 Ch. 303.
(2) [1925] A. C. 700.
(3) Ibid. 719.
(4) [1921] 3 K. B. 40, 90.
(5) [1898] A. C. 1.
(6) [1901] A. C. 495.

In *Rex* v. *Denyer* (1) I think the Court was not correct in saying that there was not the remotest nexus or relationship between a right to put the name of Read on the stop list and a right to demand from him 257*l.* as the price of abstaining from that course. On the contrary I think there was a nexus in the circumstances: see the remarks of Mellish L.J. above referred to in *Fisher & Co.* v. *Apollinaris Co.* (2) There may be circumstances in connection with a demand which may make it illegal, but I cannot see the presence of any such circumstance either in this or in *Denyer's* case. (1)

With regard to the second cause of action, that is for money had and received by the defendants, we were much pressed by the learned counsel for the plaintiffs with the cases of *Cadaval* v. *Collins* (3); and *Williams* v. *Bayley*. (4) In my view both those cases are distinguishable. In the first there had been fraudulent use made of legal process; in the second, the Court found that an agreement to make an equitable mortgage of the property had been obtained from a father, he well knowing that if he did not make the agreement his son would be prosecuted with a moral certainty of conviction. Both those cases must be read with reference to the facts, which are entirely different from those now before the Court. Having regard to the evidence given in the present case, I am unable to see that there was any such duress as would entitle the plaintiffs to recover this money from the defendants. I have already referred to the learned judge's note of the evidence, which is borne out by the transcript of the shorthand notes. The defendants had a perfect right to threaten to put the plaintiffs on the stop list, just as the obligees in the

(1) [1926] 2 K. B. 258.
(2) L. R. 10 Ch. 297, 303.
(3) 4 Ad. & E. 858.
(4) L. R. 1 H. L. 200.

instance given above had a perfect right to threaten the obligor to bring an action against him if he did not pay the 1000*l*. Both had a right to compromise their full rights for something more lenient, and it cannot be said in either case that the money so obtained was money obtained by duress.

I do not desire to add anything to what my Lord has said on the question of misdirection, but upon the ground that there was no evidence to go to the jury, I am of opinion that this appeal should be allowed and judgment entered for the defendants with costs.

ROMER J. The allegations of fraud with which the statement of claim is plentifully sprinkled having been abandoned, the relevant facts of this case are simple, and for the most part are not in dispute. The plaintiffs being suspected of having infringed a price regulation of the Motor Trade Association, of which they were members, were invited to attend a meeting of the stop list committee of the Association on March 10. The two directors of the plaintiff company, Captain Hardie and Captain Lane, duly attended the meeting, at which the former stated in evidence that he "thought" the defendant Chilton was present, and the latter stated that he "believed" both the defendant Chilton and the defendant Bennett were present. As a result of the meeting the stop list committee appear to have come to the conclusion that the infringement by the plaintiffs of the price regulation had been proved. The plaintiffs accordingly became liable to have their name placed upon the Association's stop list. Had this been done, the result would no doubt have been a serious matter for the plaintiffs. The stop list committee were therefore prepared to take a more lenient course and to recommend to the council of the Association to treat the matter as being satisfactorily ended if the plaintiffs, to mark their regret, would pay a sum of 200*l*. to the indemnity fund of the Association, would sign and pay for an undertaking as to their future conduct to be inserted in "Motor Commerce," and repurchase the car, the sale of which by the plaintiffs to an emissary of the Association for 225*l.* had been the cause of all the trouble. This decision of the committee was in due course communicated to the plaintiffs by the defendant Denyer, who was the agent of the committee for such purposes, by a letter dated March 18, 1926. The Association had no express power to accept a payment and undertaking in lieu of inserting an offending member's name in the stop list; but in mercy to the offenders the Association in proper cases adopted this course from time to time, and this fact was known to the plaintiffs who recognized that they were being offered a lenient alternative. They tried, however, to get the alternative made even more lenient, and at an interview with the defendant Denyer on March 24, Captain Lane was successful in obtaining an alteration of the terms by virtue of which, in lieu of an immediate payment of the 200*l.*, the plaintiffs were to pay 100*l.* down and another 100*l.* in three months time. Thereupon the plaintiffs paid to the Association the sum of 332*l.*, which was made up of the 225*l.*, the first 100*l.*, and 7*l.* for the cost of insertion of their undertaking in "Motor Commerce." The second sum of 100*l.* was never paid by the plaintiffs, but on October 28, 1926, they issued the writ in this action against Chilton, Bennett and Denyer, claiming, amongst other relief not now material, (*a*) damages for conspiracy, and (*c*) money had and received by the defendants to the use of the plaintiffs. By their statement of claim they asked for damages including the 332*l.* as special damage, and, alternatively, the sum of 332*l.* as and by way of money had and received by the defendants to the use of the plaintiffs. Inasmuch as it must be conceded that the defendants, whether acting individually or in combination, would have committed no wrongful act had they placed the names of the plaintiffs upon the stop list without the plaintiffs being given the lenient alternative, it would seem at first sight to require some little ingenuity to discover in the facts that I have mentioned, any cause of action vested in the plaintiffs. So far as the claim is for money had and received by the defendants to the use of the plaintiffs, it does not appear that the defendants, or any one of them, ever had

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or received anything. The plaintiffs' only remedy, if any, must therefore lie in damages, and it was a judgment for damages that the plaintiffs succeeded in obtaining in the Court below.

Now that judgment is based upon certain propositions of law which were enunciated by Avory J. in the course of his summing up to the jury, and which involve the following one: If A., or A. and B. acting in agreement together, induce C. to pay money which he may lawfully pay, to some other person who has no legal claim to it, by means of threats which are calculated to deprive any reasonable man of his voluntary power of action, and C. thereby suffers damage, he is entitled to recover such damages from A. or A. and B. as the case may be, even though the threat be to do some lawful act. But I am not aware of any authority for so wide a proposition as this, and it is, in my respectful opinion, an unsound one in law.

It is not difficult to imagine cases that may arise in everyday life in which the proposition, if applied, would produce results that are nothing less than extravagant. Some of these have already been referred to by Scrutton L.J. and I do not desire to multiply examples. "But"—say the plaintiffs—"however extravagant you may regard the proposition in its relation to your domestic or your club life, or any other situations your fancy may suggest, allow us to point out to you that in the present case the defendants have committed a felony for which they are liable to penal servitude for life." This, I agree, is a serious matter indeed, if it be true, serious not only to the defendants in the present case, but to all who in analogous circumstances may seek to temper justice with mercy; and whatever modifications may have to be introduced into the proposition of law to which I have referred, that proposition must still be expressed in terms wide enough to cover the present case, if in the present case a felony has in truth been committed.

In order to ascertain whether this be the fact or no, it becomes necessary to consider s. 29, sub-s. 1, of the Larceny Act, 1916. That sub-section, so far as material to the present case, provides as follows: "Every person who utters, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause any property or valuable thing . . . . shall be guilty of felony." Sub-s. 4 provides: "For the purposes of this Act it is immaterial whether any menaces or threats be of violence, injury, or accusation to be caused or made by the offender or by any other person."

It is said that the letter of March 18, 1926, was such a letter as is mentioned in the first sub-section. It was actually written by Denyer alone, and, speaking for myself, I am unable to find anything worthy of the name of evidence to show that the other defendants had anything to do with the uttering of it. But for the purposes of this judgment I am willing to assume that the three defendants agreed together to have the letter written and sent to the plaintiffs.

The question then arises whether the demand contained in the letter was made with menaces and without any reasonable or probable cause. In my opinion this question must be answered in the negative, for in my opinion the demand was not made without reasonable or probable cause. What the meaning of the word "probable" may be in this connection, is a question that I am content to leave to others who are more familiar with the criminal law than I am. For it is sufficient for the defendants, if they had reasonable cause for making the demand. That they had I can feel no doubt. Having it in their power to place the plaintiffs on the stop list, but being desirous of taking a more lenient course, they gave the plaintiffs the option of paying a fine. I am wholly unable to understand how it can be suggested that this was not an eminently reasonable thing to do.

The question of reasonable or probable cause appears to be one for the jury, but only of course where there is some evidence of its absence. In the present case there is, in my opinion, none. I cannot find that the defendants have done anything of which complaint can be made in a Court, whether of civil or criminal jurisdiction. In my opinion the evidence shows at the most no more than that the defendants in good

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faith proposed and agreed to abstain from doing something that they could lawfully do, on condition that the plaintiffs made a payment that they could lawfully make. This being so, the case should have been withdrawn from the jury, and judgment entered for the defendants with costs. That must now be done, and the appeal allowed with the usual consequences.

Appeal allowed.

Solicitors for appellants: *Kenneth Brown, Baker, Baker.*
Solicitor for respondents: *C. S. Tomlinson.*

J. S. H.

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Nov. 30;
Dec. 1.
1928.
March 19.

CONQUER *v.* BOOT.

Res judicata—Contract—Breach—Particulars of Damage—Subsequent Action for Breach of same Contract—Different Particulars of Damage—Cause of Action.

The defendant contracted to build a bungalow for the plaintiff in a good and workmanlike manner. The plaintiff brought an action in the county court "for breach of contract to complete in a good and workmanlike manner," setting forth particulars of what he alleged required to be done to fulfil the contract, and he obtained damages. He afterwards brought another action, claiming in identical terms for breach of the same contract except as to amount claimed, and the addition that the contract was to build "with proper materials." This was followed by particulars different from but of the same character as those in the first action. The defendant pleaded res judicata:—

Held, that the cause of action was the same in both actions—namely, breach of the contract—and that the question having been decided in the first action the matter was res judicata, and the plaintiff could not recover further damages.

APPEAL from Brentford County Court.

The defendant agreed to build for the plaintiff a bungalow at Greenford, Middlesex, "in a good and workmanlike manner." After the bungalow was erected the plaintiff, in August, 1926, brought an action in the Brentford County Court against the defendant claiming damages for breach of the contract. The particulars of claim were as follows: "The plaintiff's claim is against the defendant for the sum of 24*l.* 10*s.* for breach of contract to complete in a good and workmanlike manner a bungalow known as 'Fauld's Hope,' at Millet Road, Middlesex," followed by particulars. These set out some seventeen items, e.g., "Replace water pipe with water pipe of proper size. . . . . Supply and fix air brick for larder. . . . . Half timbering for front of house. . . . . Make good cracks in walls and ceilings due to faulty workmanship. . . . . Rehang sitting room door, etc."

In this action the plaintiff recovered 24*l*. damages. In June, 1927, the plaintiff brought the present action in the same county court. The claim was identical in its terms with that in the first action, except as to the amount of damages claimed, and that after the words "in a good and workmanlike manner" the words "and with proper materials" were added. The particulars set out some fourteen items, differing from those in the former action, but of the same character. The defendant set up the defence of res judicata, but the plaintiff obtained judgment for 81*l*. 19*s*.

The defendant appealed.

F. J. Powell for the defendant. This matter is res judicata. The present claim is identical with that in the first action—namely, for damages for breach of the same contract—the only difference being as to the particulars and as to the amount of the damages. The law is stated concisely in Stephen's Digest of the Law of Evidence, 10th ed., p. 53: "Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based." The judgments in both cases were based on breach of the same contract, the cause of action being the same in each action.

[He was stopped.]

Eve for the plaintiff. The matter is not res judicata, because the evidence necessary to support the claim in the present case is different from that which was required in the former action. Each breach of the contract constitutes a separate cause of action: see *Ord* v. *Ord*. (1) The test to

(1) [1923] 2 K. B. 432.

apply to ascertain if a matter is res judicata is whether the same sort of evidence would prove the plaintiff's case in the two actions: per Brett M.R. in *Brunsden* v. *Humphrey.* (1) In that case the Court of Appeal (Lord Coleridge C.J. dissenting) held that an action for damages for personal injuries was not barred by a previous action between the same parties, arising out of the same tortious act, for damages for injury to goods: see also *In re Hilton* (2) and *Bristowe* v. *Fairclough.* (3) In the case of a tradesman's bill, where the various items are connected so that the dealing is continuous, the whole bill forms one demand and one cause of action: *Grimbly* v. *Aykroyd* (4); *Dodd* v. *Wigley* (5); and Serjeant Manning's note thereto. (6) But here the claims do not form one account, and the maxim, "Nemo debet bis vexari pro una et eadem causa" does not apply. At the time of the first action the plaintiff was not aware of the damage in respect of which he now sues, and the following passage in Spencer Bower on Res Judicata, p. 112, is adopted in this argument: "If the party, though omitting to bring to the notice of the judicial tribunal some fact or matter which he desires to establish or raise in subsequent litigation, can show that at the time of the former proceedings he was not only in fact, but also excusably, ignorant thereof, and that such fact or matter, if then proved, would have altered the whole aspect of the case, he is entitled to claim that no estoppel by implied res judicata shall take effect, or other adverse inference of any kind shall be made against him, by reason of such omission."

[*Phosphate Sewage Co.* v. *Molleson* (5) was also referred to.]

Powell replied.

1928. March 19. SANKEY L.J. (7) This is an appeal from the learned judge sitting at Brentford County Court

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(1) (1884) 14 Q. B. D. 141, 146.
(2) (1892) 67 L. T. 594.
(3) (1840) 1 Man & G. 143.
(4) (1847) 1 Ex. 479.
(5) (1849) 7 C. B. 106.
(6) Ibid. 114.
(7) (1879) 4 App. Cas. 801, 814, 815.

(8) The learned judge had been made a Lord Justice since the hearing on December 1, 1927. The delay in delivering judgment arose from the absence of both judges on circuit.

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in a case where a Mr. Conquer was the plaintiff and Mr. Boot was the defendant. The learned judge at the conclusion of the case and after hearing arguments on points of law gave judgment for the plaintiff for 81*l.* 19*s.*, and it is from that judgment that the present appeal is brought.

It is brought upon the ground (inter alia) that the matter was res judicata, or in other words, that the plaintiff had already brought an action in respect of the matters complained of and had judgment given in his favour, and that that precluded him from bringing a second action in respect of the matter. The only point argued has been res judicata, which goes to the whole of the appeal, as we thought it better to have that point argued first. This is the last case I shall try in the Divisional Court, and I would like to say that we have had the greatest possible assistance from both the learned counsel in this case, and I have seldom heard a case better argued by two junior counsel.

The present action was started in the county court by particulars of claim in the following words: [The learned judge then read the particulars.] On pausing there for a moment it is obvious on the plaintiff's own particulars that in each action he was suing on the same contract. I am not at all saying that that is an impossible position in law and that one contract cannot give rise to several causes of action; but I do desire to point out that the plaintiff has obtained in the two actions, i.e., the action with which we are now concerned and the previous action, a sum, 105*l.* 19*s.*, which is beyond the jurisdiction of the county court, and if the plaintiff's contentions are right I can see no reason why on some future occasion he may not bring another action on the same contract in the same county court. It therefore becomes necessary to look at the particulars in the actions.

They are practically the same in both actions, the only difference being that in the second action the words "and with proper materials" are added. The plaintiff in the first action gave particulars of a number of matters which he stated constituted a breach of contract to build in a good and workmanlike manner. These particulars are fairly numerous and are set out with great particularity. In the second action the particulars are of similar character; they also are fairly numerous and are set out with great particularity. But so far as the claim is concerned it appears to me to be identical in both cases—namely, a claim for breach of contract to complete the bungalow in a good and workmanlike manner. That was a matter which obviously struck the learned county court judge, for he says in his judgment: "As to the plea of res judicata, I allowed this so far as the claim in respect of the manhole and air bricks were concerned because these defects were obvious at the time of an earlier action in August, 1926, between the same parties. So far as the bulk of the claim is concerned I disallowed it, as the state of dampness and rottenness of the premises and particularly of the flooring, was not apparent at the time of the earlier action." The question remains whether this is a correct determination in point of law.

With regard to the plea of res judicata a great number of cases have been cited to us, the most informative of which is that of *Brunsden* v. *Humphrey*. (1) In that case there was one wrongful act—namely, negligent driving—but there were two distinct causes of action—namely, the injury to the cab and the injury to the man's person—and Bowen L.J. says this (2): "It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all." Pausing there for a moment, in my view it would have been impossible for the plaintiff in that case to bring several actions in respect of the damage to his cab. He could not have sued one day for a broken wheel and next month for a broken shaft and later for a broken window and so forth; and so too, with regard to the personal injuries, it would have been impossible for him to sue one day for the loss of a leg and another day for the loss of another leg and later to sue because he lost his fingers or had injured his head. One knows that in personal injury cases damages are assessed once for all. This may be a difficulty to a plaintiff in a personal injury case,

(1) 14 Q. B. D. 141.

(2) 14 Q. B. D. 147.

but I am not so sure that in this case a like difficulty could have arisen. Brett M.R. said in this same case (1): "Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action," and then he discusses the sort of evidence which would have to be given to prove injuries to the cab and injuries to the person. In the present case, adopting the same analogy, it seems to be quite impossible to say that in the first month of the year the plaintiff could have brought his action for failure to complete the dining room in a proper and workmanlike manner and next month for failure to complete the drawing room and so forth. If that could be done I do not at all see why any of these cases should ever be brought into the High Court, because all the plaintiff would have to do would be to issue separate plaints for damages up to 100*l.* and try the whole in a county court. Counsel for the respondent in his excellent argument referred us to what appeared to me to be the strongest case in his favour, the case of *Bristowe* v. *Fairclough.* (2) I need not go into all the facts of the case, because the difference is set out in the well-known judgment of Tindal C.J. He says (3): "The plaintiff, it seems, brought an action in the Court of Exchequer upon the agreement, in which the breach assigned was the not giving the note for 730*l.*; and it appears that an order was made in that action, whereby the defendant was directed to give to the plaintiff a note for 505*l.* In the present action a second and a different breach is alleged, namely, that although the mortgage money had been called in, the defendant had neither paid the balance, nor obtained another loan for the plaintiff. The answer set up by the plea is, that the present action is brought upon the same agreement, and to recover the same damages as the suit in the Exchequer. The plaintiff replies, that although it is true that the action is on the same agreement, yet he does not sue for the same breach, but for another and different breach. It seems to me that this is a good answer to the plea, which prima facie would lead the plaintiff to suppose that it alleged that he was suing for the same cause of action." I do not think those words can apply to circumstances like those of the present case. If they were carried to the extremity, the failure to put proper material into the house might be so construed that an action could be brought in respect of each bad brick that was put into the house, on the ground that each bad brick was a separate cause of action.

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(1) 14 Q. B. D. 145.

(2) 1 Man. & G. 143, 152.

(3) 1 Man. & G. 152.

I think that the present case falls within the rule laid down by Bowen L.J. in *Brunsden* v. *Humphrey* (1): "It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all." The cause of action here is: (1.) the contract to complete in a good and workmanlike manner a bungalow, and (2.) the breach of it. I do not think that every breach of it—every particular brick or particular room that is faulty—gives rise to a separate cause of action. I am of opinion that the cause of action here was the contract and the breach of it, both of which had been assigned in the original action. I do not think it is possible to say that every one of these breaches is a separate cause of action. In that I am confirmed by the notes in Bullen and Leake's Precedents of Pleadings, 3rd ed. (1868), p. 625, where the law is correctly stated as follows: "Where the plaintiff has recovered judgment in a previous action for part only of the amount claimed, the judgment affords a good defence to a subsequent action for the same claim." Numerous cases are there cited which show it is quite impossible to treat every breach of contract of this sort as giving rise to a separate cause of action. The cases are all discussed in Mr. Spencer Bower's recent book on Res Judicata, pp. 192, 193, and he quotes the case of *Brunsden* v. *Humphrey* (1), which lays down that there may be two actions in respect of the same facts where the facts give rise to two distinct causes of action. In my view the plaintiff in this case having recovered on the contract for the breach he alleged, cannot recover in another action upon precisely the same particulars of claim, but adding further particulars of damages only. Having recovered judgment in the one action he is debarred from bringing a second action. For these reasons I am of opinion that the judgment of the county court judge was wrong and that this appeal should be allowed.

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(1) 14 Q. B. D. 147.

TALBOT J. I had an opportunity of considering this case a few days after the argument, and of coming to the conclusion, to which indeed I was inclined to come at the time when the case was argued, that the appeal should be allowed. The argument for the respondent having been completed, I wrote a judgment to that effect and will now read it. [His Lordship then read the following judgment:]

The plaintiff in 1926 by action in the county court recovered from the defendant damages for breach of a contract to complete a bungalow for him at Greenford in a good and workmanlike manner. The particulars of claim in that action set out certain matters as needing to be done in order to make the bungalow what the defendant had contracted to make it. In the present year the plaintiff brought a second action expressed to be for breach of the same contract (adding the words "and with proper materials"), but with another list of particulars. Amongst other defences the defendant raised in the county court the defence of res judicata or judgment recovered, on which the judge decided against him. The defendant appeals to this Court, and the question is whether the judge ought to have entered judgment for him.

The rule of law on which the defendant relies is thus stated by Bowen L.J. in *Brunsden* v. *Humphrey* (1): "It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all," and by Lord Halsbury in *Darley Main Colliery Co.* v. *Mitchell* (2): "No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever": see the form of plea in Bullen and Leake, 3rd ed., p. 624. The defendant

(1) 14 Q. B. D. 147.

(2) (1886) 11 App. Cas. 127, 132.

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contends that there is here but one cause of action—namely, that the defendant having promised properly to complete a bungalow for the plaintiff for a sum of money to be paid on completion, has failed to do what he promised, and that the particulars subjoined in the two actions are merely details of the manner in which he has failed to perform the one contract, and of the damages payable for his breach of it. The plaintiff on the other hand says that the first action was brought for the various breaches of contract specified in the particulars, that each of them is a separate breach of a separate contract and a separate cause of action, and that therefore the former judgment is no answer to the present action.

It appears to me that as to this the defendant is right and that the cause of action sued on in the second action is the same as that sued on in the first. It is the same in point of form. The form is substantially that in Bullen and Leake, 3rd ed., p. 271, and the precedents there referred to. It is the same also in substance. The contract is an entire contract. No claim for payment could have been made by the defendant unless and until he had finished the bungalow. There is one contract and one promise to be performed at one time, although no doubt the defendant may have failed to perform it in one or in many respects. There may of course be many promises in one contract, the breach of each of which is a separate cause of action. An example is *Bristowe* v. *Fairclough* (1), quoted by Mr. Eve in his excellent argument. There the contract contained two separate promises by the defendant to be performed at different times and in different events; and it was accordingly decided that judgment in an action for breach of one was no bar to an action for breach of the other. The period of limitation would be different for the two. Here there is but one promise, to complete the bungalow; and the question whether or not it has been performed is to be decided by the state in which the bungalow was when it was handed over by the defendant to the plaintiff as complete. From that moment the Statute of Limitations began to run as to the whole. The plaintiff could

(1) 1 Man. & G. 143.

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not alter the fact that he was recovering damages for the breach of this single promise by failing to specify in his action all the particulars of the breach and all the damages to which he was entitled. The test whether a previous action is a bar is not whether the damages sought to be recovered are different, but whether the cause of action is the same: per Bovill C.J., *Gibbs* v. *Cruikshank.* (1) If this were not so the rule would be nullified. The plaintiff relied on the judgment of Brett M.R. in *Brunsden* v. *Humphrey* (2), which mentions as a test for deciding whether two causes of action are the same, whether the same evidence will support both; and he urged that in his first action no evidence would have been admitted of breaches of contract by the defendant other than those specified in the particulars. But the question is not whether, as the action was actually brought, the plaintiff could or could not go into certain matters, but whether he could if he had given the proper particulars have proved the whole of what he claims in the second action under the cause of action for which he sued in the first: see *Death* v. *Harrison* (3), especially the judgment of Cleasby B., and *Newington* v. *Levy.* (4) He could not justify an action for the loss of an eye by the defendant's negligence when he had already recovered for the loss of a foot by the same negligence, by saying that in the first action he only gave particulars of the loss of his foot. No more can he recover in one action for breach of a single promise in ten respects and in another for breach in ten other respects of the same promise. The giving of such particulars as are necessary to enable the defendant to know what case he has to meet is merely incidental to the bringing of the action, and a plaintiff cannot give himself a right to bring an action which otherwise he could not bring by failing to specify all the matters which go to make up his one cause of action, or to claim all the relief to which he is entitled in respect of it. This is well illustrated by *Serrao* v. *Noel.* (5) There the plaintiff alleged that the defendant was detaining certain shares, the plaintiff's property. He first brought an action in the Chancery Division, claiming an injunction to restrain the defendant from parting with the shares. In this action the defendant consented to an order for the delivery of the shares to the plaintiff. He afterwards sued in the Queen's Bench Division for damages for the detention. It was held that he could not recover, since the damages could have been claimed in the former action, injunction and damages being only different forms of relief applicable to the same cause of action. Bowen L.J. said (1): "The principle is, that where there is but one cause of action, damages must be assessed once for all," and this was enforced, although in the former action damages had not been claimed, and consequently could not be assessed.

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(1) (1873) L. R. 8 C. P. 454, 460.

(2) 14 Q. B. D. 146.

(3) (1870) L. R. 6 Ex. 15, 19.

(4) (1870) L. R. 6 C. P. 180.

(5) (1885) 15 Q. B. D. 549.

There are many authorities on this subject or connected with it, but they all come back to the same test, is the cause of action in the second action the same as that for which the plaintiff had judgment in the first? If it is, the second action cannot be maintained, and (speaking generally) it is immaterial whether the plaintiff knew or might have known, when he brought the first action, the facts on which he relies in the second: see *Clegg* v. *Dearden* (2) and the judgment of Holroyd J. in *Howell* v. *Young*. (3) In *Lord Bagot* v. *Williams* (4) the knowledge of the plaintiff or his agent as to what was owing to the plaintiff when the first action was brought was considered, not because a plea of judgment recovered would not have been good, although when the first action was brought the plaintiff did not know of the debt sued on in the second action, but in order to ascertain for what debts in fact the former action (in an inferior court in which there were no pleadings) was brought.

I think therefore that the plea of res judicata or judgment recovered is an answer to the whole of this action, and that the defendant is entitled to judgment. This being so it is unnecessary to consider the other points which the defendant

(1) 15 Q. B. D. 559.
(2) (1848) 12 Q. B. 576.
(3) (1826) 5 B. & C. 259, 266.
(4) (1824) 3 B. & C. 235.

takes in his notice of appeal, and on which we have heard no argument.

Appeal allowed.

Solicitors for appellant: *Champion & Co.*, for *Turberville Smith & Co., Uxbridge.*

Solicitor for respondent: *E. Mackie.*

W. L. L. B.

[IN THE COURT OF APPEAL.]

C. A.

1928 *Feb.* 16.

BROOKES AND OTHERS *v.* LIFFEN.

Landlord and Tenant—Rent Restriction—Decontrol—"Landlord"—Rateable Value—Rent less than two-thirds of—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*); *sub-s.* 7—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 7, "where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed."

By s. 12, sub-s. 1 (*g*), of the same Act, "The expression 'landlord' . . . . includes in relation to any dwelling-house any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house. . . . ."

By the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1, "Where the landlord of a dwelling-house to which the principal Act" [the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920] "applies is in possession of the whole of the dwelling-house at the passing of this Act,"—i.e., on July 31, 1923—. . . . "then from and after the passing of this Act . . . . the principal Act shall cease to apply to the dwelling-house."

The defendant was the assignee of a lease of a dwelling-house at a rent which was less than two-thirds of the rateable value thereof, and on July 31, 1923, was in actual possession of the whole of the dwelling-house upon the terms of the lease:—

Held, that, notwithstanding s. 12, sub-s. 1 (*g*), of the Act of 1920, the defendant was not the landlord of the dwelling-house within the meaning of s. 2, sub-s. 1, of the Act of 1923; that therefore that sub-section of the later Act did not apply, and that the dwelling-house was still subject to the other provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 and 1923.

Finey v. *Gougoltz* [1926] 2 K. B. 322 doubted.

Judgment of the Divisional Court [1928] 1 K. B. 441 affirmed.

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APPEAL from the decision of a Divisional Court. (1)

In 1904 the defendant became the lessee of a dwelling-house known as 15 Gillingham Street, Pimlico, S.W., under an assignment of a lease for ninety-eight years, which had twenty years of its term unexpired. The net rateable value of the house, of which the plaintiffs were the freeholders, was 38*l*..; the rent reserved by the lease was 5*l*. a year. On July 31, 1923, the date of the passing of the Rent and Mortgage Interest Restrictions Act, 1923, the defendant was in occupation of the whole of the house. In June, 1924, it was agreed between the parties that when the lease expired, which it did on June 24, 1924, the defendant should remain in possession as a quarterly tenant at the rent of 56*l*. a year, and the defendant remained in possession under that agreement. In November, 1926, the plaintiffs served on the defendant a notice to quit on March 25, 1927. The defendant refused to leave the house, insisting that he was protected by the Rent Restrictions Acts. The plaintiffs brought this action in the Westminster County Court to recover possession of the house, claiming that it had become decontrolled by virtue of s. 2, sub-s. 1, of the Rent and Mortgage Interest, Restrictions Act, 1923, and s. 12, sub-ss. 1 (*g*) and 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. (2)

The county court judge gave judgment for the defendant. The plaintiffs appealed, and the Divisional Court (Salter and Talbot JJ.) affirmed the judgment of the county court.

The plaintiffs appealed to the Court of Appeal.

H. Bensley Wells for the appellants. This house became decontrolled by virtue of the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1, on July 31, 1923, the date of the passing of that Act. Inasmuch as the rent of the house was less than two-thirds of the rateable value thereof, it must be supposed that no tenancy existed between the appellants and the respondent: Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 7.

But the respondent was in actual possession of the house and so is to be included in the term "landlord" by s. 12, sub-s. 1 (*g*), of the Act of 1920; and as he was in actual possession of the whole house, the Act of 1920 ceased to apply to the house on July 31, 1923; in other words, the house became decontrolled on that date. Consequently, the respondent ceased to be protected by the Rent Restriction Acts and there is no answer to the appellants' claim to possession. In *Finey* v. *Gougoltz* (1) where a lessee in the same position as the respondent had sublet part of the premises he was held to be the "landlord."

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(1) [1928] 1 K. B. 441.

(2) See the headnote.

J. Ronald Walker for the respondent was not called upon.

SCRUTTON L.J. The dwelling-house in this case is brought within the Rent Restriction Acts by s. 12, sub-s. 7, of the Act of 1920, which provides that "where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . . . and this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed." At the passing of the Act of 1920 there were two groups of dwelling-houses which required special consideration; first, houses let on long leases where the rent which was being paid on August 4, 1914, was far below the real value of a tenancy of the house when the lease came to an end; it was not the intention of the Legislature to restrict the landlords of these houses to the rent at which they were let on August 4, 1914, Secondly, a number of houses had been let during the war from compassionate motives to ex-service men or their wives or children at less than commercial rents. It was not the intention of the Legislature that the standard rent of these houses should be the rents at which they were first let after August 4, 1914. Therefore, it was enacted by s. 12, sub-s. 7, that the Act, although it applied to the dwelling-house, should not apply to the rent or tenancy of the dwelling-house if the rent in respect of the tenancy was less than two-thirds of the rateable value. Then it was provided by s. 2, sub-s. 1, of the Act of 1923 that "where the landlord of a dwelling-house to which " the Act of 1920 " applies is at the passing of this Act in possession of the whole of the dwelling-house, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be," the Act of 1920 " shall cease to apply to the dwelling-house. . . . ." By sub-s. 3 of the same section " 'possession' shall be construed as meaning 'actual possession,' and a landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent." Actual possession means something more than a right to enter into possession which is not exercised : *Hall* v. *Rogers*. (1)

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(1) [1926] 2 K. B. 322.

The ingenious argument presented to us is in effect that s. 2, sub-s. 1, of the Act of 1923, annuls s. 12, sub-s. 7, of the Act of 1920 ; that whereas the sub-section of the earlier Act says " this Act shall apply in respect of such dwelling-house " yet now, since the passing of the later Act, it shall not apply to such dwelling-house ; true it is that there is a tenant, but he is really the landlord though he may not know it, and, being a landlord, he was in possession of the whole of the dwelling-house at the passing of the Act of 1923 ; no doubt he held of another, but that, according to this contention, is immaterial ; the fact of his being in possession is to decontrol the house. This conclusion is said to follow from the learned counsel's reading of s. 12, sub-s. 1 (*g*) ; the definition clause, of the Act of 1920 : " The expression 'landlord' also includes in relation to any dwelling-house any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house . . . ." Here, it is said, is a person—the Act says " other than the tenant," but those words must be deleted—who is entitled to possession or would but for this Act be entitled to possession. Mr. Bensley Wells reads that definition as turning a man who is in fact a tenant into a landlord who, being in possession, causes the house to be decontrolled for the benefit of the real landlord and against the interest of the real tenant. With all respect to that

(1) (1925) 69 Sol. J. 397.

argument it is too ingenious; it involves a misapplication of s. 2, sub-s. 1. That sub-section has to do with the actual owner being in or coming into possession; it has nothing to do with a tenant or lessee in possession under his letting or his lease, and it certainly does not contemplate that such a tenant by virtue of his possession shall cause the house to be decontrolled against his own interest and in favour of his landlord. It is intended to deal with real landlords, and I am unable to read s. 12, sub-s. 1 (*g*), of the Act of 1920 as providing a fictitious landlord for s. 2, sub-s. 1, of the Act of 1923 to operate upon. Mr. Bensley Wells contended that if the respondent had sublet the premises he would have come within the decision of MacKinnon J. in *Finey* v. *Gougoltz*. (1) With regard to which I need only say that there has been no subletting in the case before us, and that when a similar question arises between a lessee and his sub-tenant I will consider whether *Finey* v. *Gougoltz* (1) was rightly decided. In the present case the persons who were the landlords within the real meaning of s. 2, sub-s. 1, of the Act of 1923 were never in actual possession of the dwelling-house either at or after the passing of that Act. The Act of 1920 still applies to the dwelling-house. The appeal must be dismissed.

SANKEY L.J. I am of the same opinion. The question to be decided is, Did this house become decontrolled? Apart from the Rent Restriction Acts the appellants were in fact the landlords and the respondent was in fact the tenant of the house in question; but Mr. Bensley Wells refers to s. 2 of the Act of 1923 and two sub-sections—namely, sub-s. 1 (*g*) and sub-s. 7 of s. 12 of the Act of 1920. By s. 2 of the Act of 1923 it is provided that "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act . . . . then from and after the passing of this Act . . . . the principal Act shall cease to apply to the dwelling-house . . . ." Now, says the learned counsel, although the word "landlord" is used there, and although, apart from these Acts, the appellants

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(1) [1926] 2 K. B. 322.

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Sankey L.J.

were in fact the landlords, yet by a construction, which I cannot call the true construction, of the other two sub-sections on which he relies, the person who was in fact the tenant has become in law the landlord; that therefore s. 2 of the Act of 1923 applies, and the house has become decontrolled. And he weaves his argument in this wise: Sect. 12, sub-s. 7, of the Act of 1920 provides that "where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy"; the rent of this house was less than two-thirds of the rateable value; therefore, as the sub-section goes on to enact, "this Act shall apply in respect of such dwelling-house as if no such tenancy existed or ever had existed"; consequently it cannot be said that the respondent's tenancy ever existed at all. Then comes the third step in this argument whereby it is sought to establish that by virtue of the Acts the respondent was in law the landlord and not the tenant. This would be a curious result of the legislation. Do the Acts say so? On this point we are referred to s. 12, sub-s. 1 (*g*) of the Act of 1920, which provides that the expression "landlord" also includes in relation to any dwelling-house any person, other than the tenant, who is or would but for this Act be entitled to possession of the dwelling-house." But for this Act, says Mr. Bensley Wells, the respondent is or would be entitled to possession of the dwelling-house, for possession means actual possession, and he was in actual possession.

But, first, does the respondent come within that definition? And secondly, what is the real meaning of the words "landlord of a dwelling-house" in s. 2 of the Act of 1923? In answer to the first question Mr. Bensley Wells has to say that in spite of s. 12, sub-s. 7, of the Act of 1920, the tenancy must be looked at in order to see whether the respondent is or would but for the Act be entitled to possession, but, when it comes to considering whether the respondent is a "person other than the tenant," then s. 12, sub-s. 7, must be rigorously applied and the tenancy must not be looked at at all. He cannot approbate and reprobate the sub-section according as it suits his argument. For this reason I cannot agree that the actual tenant was in law the landlord within the meaning of s. 12, sub-s. 1 (*g*). Upon the other question, the meaning of "landlord of a dwelling-house" in s. 2, sub-s. 1, of the Act of 1923, I agree with the opinion of Salter J. in the Court below (1), that "the word 'landlord' must be loosely used there because, strictly speaking, there cannot be a landlord without a tenant and a tenure and the sub-section deals with a case where there is neither tenant nor tenure. 'Landlord' clearly must mean nothing more than 'owner.'" Notwithstanding the ingenious argument for the appellant, the appeal must be dismissed.

RUSSELL J. I agree.

Appeal dismissed.

Solicitors for appellants: *Stephenson, Harwood & Tatham.*
Solicitor for respondent: *H. A. Phillips.*

W. H. G.

MANSFIELD *v.* ROBINSON.

1928
April 19.

Arbitration—Agricultural Holdings Act—Costs—Agreement by Parties as to Incidence—Discretion of Arbitrator—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 16; *Sch. II., para.* 15.

The parties to an arbitration under the Agricultural Holdings Act, 1923, agreed beforehand that the successful party should have costs on the High Court scale. The agreement was not communicated to the arbitrator. The arbitrator gave his award in favour of the landlord, and awarded that each party should pay its own costs. In an action by the landlord to enforce the agreement the county court judge gave judgment for the tenants on the ground that the Act gave discretion to the arbitrator as to costs:—

Held, allowing the appeal, that the agreement was valid and enforceable.

APPEAL from Great Grimsby County Court.

On January 6, 1927, William Corbutt was appointed to act as arbitrator on a claim under s. 12 of the Agricultural Holdings Act, 1923 (13 & 14 Geo. 5, c. 9), the parties being

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(1) [1928] 1 K. B. 444.

1928

MANSFIELD v. ROBINSON.

the tenants, E. H. Robinson and others, and the landlord, Alexander Mansfield. The dispute, the merits of which are not material, concerned the rights of the tenants after receiving notice to quit. Before the commencement of the arbitration the solicitors for the parties agreed in writing that " whoever the successful party may be, he shall be entitled to costs on the High Court scale as between party and party." In the result the arbitrator made his award in favour of the landlord, and awarded that each party should bear its own costs. The fact of the above agreement was not brought to his notice. When the landlord's solicitors applied to the tenants' solicitors for costs on the basis of the agreement the latter disputed the applicability of the agreement and refused to pay. The landlord accordingly brought this action in the county court against the tenants, the defendants, claiming 94*l.* 2*s.* 10*d.*, the estimated amount of the costs of the arbitration, on the basis of the agreement, after taxation. The county court judge held that the agreement was that the successful party should be entitled to costs on the High Court scale and that the landlord was the successful party ; but he held, that having regard to the provisions of s. 16 and para. 15 of Sch. II. to the Act of 1923, which enact that the costs shall be in the discretion of the arbitrator, the agreement was invalid, and gave judgment for the tenants.

The landlord appealed.

Sandlands for the landlord. The agreement between the parties was valid. The county court judge was misled by the case of *Gray* v. *Lord Ashburton.* (1) But the only point it decided was that where an arbitrator has exercised his discretion on proper materials the Court cannot interfere. Only questions and differences can be dealt with by the arbitrator, and in the present case there was none as far as costs were concerned, and no argument was addressed to the arbitrator with regard to the costs. He had no power to deal with them, for they were not in issue. Just as the parties may limit the dispute to the consideration of some claims only, so can they agree to eliminate the question of costs from the dispute. *Prince* v. *Haworth* (1) is in point. There the parties to a probate action concerning the validity of two wills agreed before the action came on that whichever will was upheld the costs of both parties should be paid out of the estate, whether the Court so ordered or not. The Court pronounced in favour of one of the wills, and on application refused to sanction the above agreement and directed that the unsuccessful party should pay costs. In an action by the latter to enforce the agreement the Court held that the contract was valid, although Order LXV., r. 14A, of the Rules of the Supreme Court—which have the force of statute: *Kayley* v. *Hothersall* (2)—enacted that the costs should not come out of the estate unless the judge should otherwise direct. Every one has full freedom to make a contract except on two well known grounds—namely, that it is (i.) against public policy, (ii.) forbidden by statute, and the present agreement is neither. The burden of showing that this freedom to contract has been taken away rests on those who so assert—per Lord Blackburn in *Managers of Metropolitan Asylum District* v. *Hill* (3), cited with approval by Lord Watson reading the judgment of the Privy Council in *Canadian Pacific Ry. Co.* v. *Parke.* (4) Sect. 16 is a procedure section providing how questions which by other parts of the Act are referred to arbitration shall be decided—per Scrutton L.J. in *Lowther* v. *Clifford* (5)—and the question of costs is not one of them. Para. 15 of Sch. II. is directory not peremptory: see *Rex* v. *Leicester Justices.* (6) The tenants are estopped from repudiating this agreement, for the landlord was thereby prevented from asking for costs from the arbitrator.

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(1) [1917] A. C. 26.

[*Carr* v. *London and North Western Ry. Co.* (7); *Cole* v. *Greene* (8); *Learoyd* v. *Bracken* (9); *Barrett* v. *Duke of Bedford* (10); and Broom's Legal Maxims, 9th ed., p. 446, were also referred to.]

(1) [1905] 2 K. B. 768.
(2) [1925] 1 K. B. 607, 612.
(3) (1881) 6 App. Cas. 193, 208.
(4) [1899] A. C. 535, 545.
(5) [1927] 1 K. B. 130, 143–4.
(6) (1827) 7 B. & C. 6.
(7) (1875) L. R. 10 C. P. 307.
(8) (1843) 13 L. J. (C. P.) 30.
(9) [1894] 1 Q. B. 114.
(10) (1800) 8 T. R. 602.

Maurice Healy for the tenants. It is not contended that there cannot be a valid agreement of this kind, but the subject-matter of such an agreement must be withdrawn from the consideration of the arbitrator with his approval. Otherwise, if he makes an award as to costs, the agreement is not valid. Sch. II., para. 15, to the Act gives discretion to the arbitrator as to costs, and he has awarded them. If after an agreement, communicated to the arbitrator, that costs should be on the High Court scale, the arbitrator said that as the scheme of the Act was to make the costs as low as possible—see s. 17, sub-s. 1—he thought the agreement unreasonable, and awarded the costs on the county court scale, could it be said that he could not do so ? An agreement to withdraw costs from the arbitrator is bad, but an agreement that when awarded by him they should be on the High Court instead of the county court scale would be good, as not infringing the Act. But parties cannot by agreement oust the jurisdiction of the Courts: see *Farquharson* v. *Morgan.* (1) In *Walter* v. *Bewicke, Moreing & Co.* (2), where the parties agreed that there should be no costs on either side, the Court granted an application by the successful party to tax the costs of interlocutory proceedings. In *In re Frank James & Sons* (3), where a local council had agreed to pay an umpire a certain sum, the Court enforced the Taxing Master's decision allowing a lower sum.

[TALBOT J. But there another party, the Local Government Board, as protectors of the taxpayers' interests, was concerned.]

The landlord took up the award and therefore cannot be heard to say that it is bad.

SALTER J. This is an appeal from a judgment of the learned county court judge at Great Grimsby, who found for the tenants, the defendants in an action to recover money alleged to be due under an agreement. The question is whether the agreement is valid and enforceable in law. The learned judge held it was not. The appeal raises a question of some general importance—namely, whether the parties to an arbitration under the Agricultural Holdings Act, 1923, can make a valid agreement between themselves governing the costs of the pending arbitration notwithstanding that the statute provides that the costs of such an arbitration shall be in the discretion of the arbitrator.

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(1) [1894] 1 Q. B. 552, 560.
(2) (1904) 90 L. T. 409.
(3) [1903] W. N. 99.

The plaintiff was the landlord and the defendants the tenants of an agricultural holding, and certain differences arose between them. The only one with which we are concerned arose under s. 12 of the Act. The parties proceeded to arbitration under the Act; in default of their agreement the Minister appointed an arbitrator and he made an award. Before the hearing the parties made an agreement which the learned judge found to be contained in three letters which he construed. [His Lordship read them.] It was contended that he had misread the letters, but I agree with his finding as to their meaning. The arbitrator determined the dispute between the parties, and the landlord was the successful party. With regard to costs he said: "I award and direct that each party shall bear its own costs of and incidental to the arbitration and shall pay one moiety of my costs of this award." Each party did pay their moiety, and this action is now brought by the landlord upon the agreement contained in those letters, to recover, subject to taxation, the costs which, in the event which has happened, were agreed to be paid by the tenants to the landlord, and the only question that arises is whether that is an enforceable agreement.

One asks: Why is it not an enforceable agreement? In my view it is not contrary to public policy there is nothing illegal or immoral about it. But it is said that it is rendered unenforceable by virtue of the provisions of s. 16 of the Act, and of paras. 15 and 16 of the Second Schedule.

Before I come to those points I may say in passing that it might perhaps have been argued that this was not an arbitration under the Agricultural Holdings Act at all. In the case of *Lowther* v. *Clifford* (1) s. 16 was considered in the Court of

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(1) [1927] 1 K. B. 130, 143–4.

Appeal and Scrutton L.J. expressed the view that that section was a procedure section, and that only those matters of dispute for which arbitration had been provided earlier in the Act should be dealt with by arbitration in the procedure there laid down. It appears that the actual dispute now in question between the parties was not a dispute for which arbitration had been provided in the earlier sections, and it might therefore be questionable whether this was in truth an arbitration under the Act at all; but it was dealt with as such an arbitration, and I do not base any decision on that ground.

The question is whether it is allowable to parties to an arbitration of this kind to make their own agreement as to costs. The arbitrator under the Act is not in the strict sense of the term an arbitrator, that is to say he is not a person to whom the parties voluntarily refer a dispute and who derives his authority from their consent. He is imposed upon them by the law and not by their own wishes. In the case of an arbitration in the proper sense of the word there could be, I imagine, no question that the parties in submitting their dispute to an arbitrator, could, notwithstanding the terms of s. 2 and Sch. I. (*i*) of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), which give him a discretion as to costs, make such agreement as they pleased about costs; but it is said they cannot do so in this case where the arbitrator is imposed upon them.

I am unable to distinguish the position of such an arbitrator from that of a judge in this respect. It is true that the statute of 1923, by para. 15 of Sch. II., says, in prescribing the procedure for arbitrations, that the costs shall be in the discretion of the arbitrator who may, if he thinks fit, give directions as to them; but I imagine he is not bound to do so. Mr. Healy, for the defendant, admitted that if the arbitrator had given no directions about costs this would have been a valid and enforceable agreement; but he says that as the arbitrator has made a decision the agreement cannot be enforced. In fact the agreement was never mentioned to the arbitrator at the hearing.

With regard to the discretion of a judge as to costs, which is given by Order LXV., r. 1, of the Rules of the Supreme Court, it is, I think, common practice for parties to make their own agreements as to the costs of proceedings in the High Court and county courts, and such agreements are perfectly valid and enforceable. I am not able to see why the same principle should not apply to an agreement of this kind.

The authorities seem to me to support the view which I am expressing. The learned judge seems to have been impressed by the case of *Gray* v. *Lord Ashburton* (1), but in that case all that the House of Lords decided was that the discretion of an arbitrator under the Agricultural Holdings Act, 1908, was not fettered or limited in the same way as the discretion of a judge is in some cases, but was entirely unlimited. I am not able to see anything in that case which is inconsistent with the view that I am expressing. The case of *Prince* v. *Haworth* (2) is a very strong authority in favour of the plaintiff. In that case the plaintiff had propounded a will in a probate action and Haworth had propounded an earlier will. Haworth represented the interests of an infant. During the course of the proceedings a contract was made between the plaintiff, Haworth and the infant. It was agreed that, whichever of the two wills was upheld, the costs of the plaintiff and of the defendant and of the infant should be paid out of the estate, whether the Court so ordered or not. The Court pronounced in favour of the will propounded by Haworth, and, on application made, refused to sanction the contract as to costs made on behalf of the infant, and directed that the plaintiff should pay the costs of Haworth and the infant. Notwithstanding that order the plaintiff sued to recover his costs against Haworth and it was held the contract was not illegal and the defendant was personally liable upon it. Lawrance J. said (3): "If all the parties to this agreement had been sui juris, can anybody doubt that they might have made it? Either party might then have charged or mortgaged his interest, such as it was, in the fund; he might even have conveyed it absolutely either to the party on the other side or to anybody else. There is a broad distinction between an agreement which tends to divert the course of justice and prevent it reaching its proper goal, and an agreement which merely regulates the rights of the parties after the course of justice has reached its proper goal. It is clear that an agreement of the latter kind is not, merely as such, void; if it were, every judgment of a court of justice would operate as a restraint on alienation of the property recovered. Then is there any special prohibition against a successful claimant to a fund or estate agreeing to pay out of the fund or estate, if and when recovered by him, the costs of the unsuccessful claimant? It is said that Order LXV., r. 14A, makes such an agreement invalid. That rule provides that the costs occasioned by any unsuccessful claim or unsuccessful resistance to any claim to any property shall not be paid out of an estate unless the judge otherwise orders. But that is merely a rule of practice, indicating what order shall, under ordinary circumstances, be made in proceedings before the Court; it does not in any way affect the conduct of the parties after the order of the Court has been made. In other words, it is quite consistent with the judge's order directing the costs to be paid by the parties that one party shall agree to pay the other party his costs, and pay them out of what fund he pleases. I come, therefore, to the conclusion that if the parties to this agreement were all of age there would be nothing to prevent them from making this agreement."

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(1) [1917] A. C. 26.

(2) [1905] 2 K. B. 768.

(3) [1905] 2 K. B. 769.

Mr. Healy relied in the course of his argument on the case of *Walter* v. *Bewicke, Moreing & Co.* (1) The headnote reads: "During the progress of an action several orders were made, upon interlocutory applications, that the plaintiff should pay the defendants' costs, in some cases 'in any event.' The action was subsequently settled upon the terms, indorsed on the briefs of counsel, 'Record withdrawn. No costs on either side,' the question of the costs of the interlocutory proceedings not being present to their minds. Held (dismissing the appeal), that after the settlement of the action the defendants were entitled to taxation and payment of their costs of the interlocutory proceedings which the plaintiff had been ordered to pay." The Court in that case merely had to construe the agreement which the parties had made and to decide what costs it covered and what costs it did not cover, but in the course of giving judgment, Collins M.R. said (1): "It appears to me that there is no ground whatever for this appeal. During the progress of the action orders were made that the plaintiff should pay costs to the defendants, in some cases 'in any event.' Those orders cannot be got rid of unless the parties have clearly agreed that those costs shall not be paid." It is therefore quite clear that the learned Master of the Rolls was of opinion that notwithstanding the orders which had been made the parties could, if they liked, by agreement have overridden those orders. With regard to *Farquharson* v. *Morgan* (2), to which we were referred, it appears to me there is nothing to assist us in that case, which was an application for prohibition. There was an error in law on the face of the award and the Court of Appeal decided that they had no power to refuse prohibition.

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(1) 90 L. T. 409.

The result in my view is that the learned judge was in error in holding that this was a void and unenforceable agreement. I can see no reason on principle and I can see nothing in authority to guide me to that conclusion. I think that these parties were entitled to make this agreement and that it is an enforceable agreement. The appeal must be allowed, and judgment entered accordingly.

TALBOT J. I am of the same opinion and I have very little to add. The parties to this proceeding being in difference whether any compensation was payable by the landlord to the tenants in respect of one of the matters dealt with by the Agricultural Holdings Act, 1923, came to an agreement before the arbitration was heard in pursuance of the statute. The question has been raised here and was raised in the county court as to what that agreement meant, but I confess I can see no ambiguity or obscurity in it at all. The agreement, putting it very snortly, was that whichever party won, and whether or not the arbitrator made any order as to costs, or whatever order he did make, the unsuccessful party should pay the costs of the successful party on the High Court scale as between party and party, to be taxed on that footing by the district registrar. That is a rational and businesslike agreement, for the parties, as to costs, know exactly where they are and the position as between them is settled upon what in nineteen cases out of twenty is a fair and reasonable basis —namely, that the party who succeeds on the issue between them should have his costs paid by the party who fails. Those who made this agreement knew no doubt perfectly well that agreements with regard to costs are constantly made in all forms of proceedings before the hearing takes place, and they knew also what the statute said with regard to costs, and they contracted having both those matters in view. It appears to me to require something very definite indeed in the Act of Parliament to lead us to the conclusion to which the learned county court judge in his very clear judgment came, that this agreement is unenforceable in law. The argument is (and the ground upon which he decided) that under Sch. II. the costs of and incidental to the arbitration and award are in the discretion of the arbitrator and he is given power, in what I may almost call common form, to direct, if he thinks fit, by whom and in what manner the costs are to be paid. There are provisions for taxation in para. 15, and there are provisions in para. 16 of that Schedule as to what he is to take into consideration in awarding costs, and as has been decided in the House of Lords his discretion is, in point of fact, practically unlimited. (1) It appears to me in the absence of any words even tending to suggest such a result, that it is impossible to say that because of the discretion conferred upon the arbitrator and the incidental powers given to him for the exercise of that discretion it is beyond the power of the parties to come to such an agreement as this. It is true, no doubt, that in the great majority of cases where parties have made an agreement as to costs they inform the tribunal of it so as to save the trouble of going into the question, but assuming that it is within the competence of the parties to make an agreement I cannot conceive how they can be under any legal obligation to communicate their agreement to the arbitrator. It is tolerably clear why both parties, while the event was yet uncertain, thought it far more satisfactory to make this agreement which, at any rate, could not do substantial injustice, than to leave the matter to the uncontrolled discretion of the arbitrator who, it was evident, might make orders which the successful party might consider very unfair to him, and make such order, not because of anything special in the circumstances of the particular case, but because of some general practice which is not uncommon amongst lay arbitrators. I think that the defendants have altogether failed to show there is anything illegal in this agreement or anything which violates the terms of the statute.

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(1) 90 L. T. 410.

(2) [1894] 1 Q. B. 552.

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(1) *Gray* v. *Lord Ashburton* [1917] A. C. 26.

I have nothing to add to what has already been said with regard to the case generally or with regard to the authorities which have been cited. I agree therefore with the conclusion that the judgment of the learned judge in the county court cannot stand, and that this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiff: *George Godfrey Warr, for John Barkers, Great Grimsby.*

Solicitors for defendants: *Mott & Parkes, for H. K. & H. S. Bloomer, Great Grimsby.*

W. L. L. B.

1928
March 21.

LLOYD *v.* COOK.

Landlord and Tenant—Rent Restriction—Dwelling-house—Tenancy of three Rooms in a House—Termination of Tenancy—Possession of Landlord—Subsequent Tenancy of two of these three Rooms—Decontrol—Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 2, *sub-s.* 1.

The respondent, who was the lessee of a house, let three rooms on the third floor to a tenant whose tenancy came to an end on August 12, 1926, whereupon the respondent again came into possession of these three rooms. On August 28, 1926, the respondent let two of these rooms to the appellant on a weekly tenancy at 14*s.* a week. The appellant made an application under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 3, for an apportionment of the rent of the whole house for the purpose of determining the standard rent of the dwelling-house consisting of the two rooms let to him :—

Held, that the fact that on the termination of the tenancy of the dwelling-house consisting of the three rooms the respondent came into possession of that dwelling-house, and that therefore by the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1, the Act of 1920 ceased to apply to that dwelling-house, did not prevent the Act of 1920 from applying to the new dwelling-house consisting of the two rooms; and consequently that the appellant was entitled to the apportionment which he claimed.

Cohen v. *Gold* [1927] 1 K. B. 865 applied.

Appeal from Bloomsbury County Court.

Mrs. Kate Cook held the house No. 14 Eversholt Street, Camden Town, N.W., under a lease for ninety-nine years from the Duke of Bedford. She let three rooms on the third floor of the house, being one back and two front rooms, to a Mr. S. J. Churchman on a weekly tenancy at a rent of 8*s.* 6*d.* a week, and his tenancy terminated by his vacating the rooms on August 12, 1926. Mrs. Cook then resumed possession of these rooms. She prepared the smaller front room for the use of her son, who occupied it when it was ready. She caused the other two rooms to be whitewashed and papered with a view to letting them. On August 28, 1926, she let these two rooms to a Mr. Frederick Charles Lloyd on a weekly tenancy at a rent of 14*s.* a week.

On August 10, 1927, Mr. Lloyd made an application to the county court for an apportionment under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 3 (1), of the standard rent on the whole house for the purpose of determining the standard rent of the two rooms let to him.

The registrar granted the application and fixed the standard rent of the two rooms at 5*s.* 8*d.*

The county court judge allowed an appeal by Mrs. Cook from that decision, holding that in the circumstances Mrs. Cook was the landlord of the dwelling-house consisting of the three rooms let to Mr. Churchman, that on the termination of his tenancy she came into actual possession of the whole of the dwelling-house within the meaning of the Rent and Mortgage Interest Restrictions Act, 1923, s. 2 (1), that thereby the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, ceased to apply to the dwelling-house, and that consequently Mr. Lloyd was not entitled to have the rent of the whole house apportioned under the latter Act.

On November 2, 1927, Mr. Lloyd gave notice of appeal from the judgment of the county court judge to the High Court.

John Duncan for the appellant. The county court judge was wrong in holding that the appellant was not entitled under the Increase of Rent, &c. (Restrictions) Act, 1920, s. 12, sub-s. 3 (1), to an apportionment of the rent of the house No. 14 Eversholt Street, for the purpose of determining the standard rent of the dwelling-house consisting of the two rooms let to him. The dwelling-house consisting of these two rooms is a "part of a house let as a separate dwelling" within the meaning of sub-s. 2 (1) of that section, and is therefore a "dwelling-house to which this Act applies" within the meaning of sub-s. 3 of that section. That Act with its various provisions is not prevented from applying to that dwelling-house by the Rent, &c., Restrictions Act, 1923, s. 2, sub-s. 1. The respondent is not, within the meaning of the latter sub-section, the landlord of the dwelling-house No. 14 Eversholt Street, or of any part of it, but is only a tenant of it: *Brooks* v.

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(1) The material provisions of the Acts are set out below in the judgment of Salter J.

Liffen. (1) Further, even if she be the landlord, she has never, within the meaning of that sub-section, come into possession of the dwelling-house consisting of the two rooms let to the appellant: *Cohen* v. *Gold* (2); *Dunbar* v. *Smith* (3); and *Darlington* v. *Arnold.* (4) The fact that the respondent previously came into possession of the three rooms let to Mr. Churchman is immaterial. Even if the dwelling-house let to the appellant had consisted of the same three rooms it would, by reason of the respondent's intervening possession, have been a new and different dwelling-house unaffected by the previous decontrol of Mr. Churchman's dwelling-house. The dwelling-house let to the appellant did not however consist of the same three rooms which had been let to Mr. Churchman, but of two of them only, and on that further ground it was a different dwelling-house from his, inasmuch as the identity of a dwelling-house can be destroyed by its division into parts: *Sinclair* v. *Powell* (5); *Marchbank* v. *Campbell* (6); and *Gidden* v. *Mills* (7); or by its amalgamation with other premises: *Phillips* v. *Barnett.* (8)

Gordon Clark (*J. C. Lockwood* with him) for the respondent. The appellant is not entitled to an apportionment of the rent of the house No. 14 Eversholt Street, under s. 12, sub-s. 3 (9), of the Act of 1920, for the purpose of determining the standard rent of the dwelling-house consisting of the two rooms let to him. That dwelling-house is not a "dwelling-house to which this Act applies" within the meaning of that sub-section, because it has been decontrolled under s. 2, sub-s. 1, of the Act of 1923. (9) The dwelling-house which consisted of the three rooms formerly let to Mr. Churchman was "a part of a house let as a separate dwelling" within s. 12, sub-s. 2, of the Act of 1920 (9), and was within the limits of rent fixed by that sub-section, and it was therefore "a dwelling-house to which this Act applies" within the meaning of that sub-section. The dwelling-house consisting of these three rooms was consequently a dwelling-house to which s. 2, sub-s. 1, of the Act of 1923 (1) applied, and when the respondent came into possession of it on the termination of Mr. Churchman's tenancy, then, by that sub-section, the principal Act of 1920 ceased to apply to it and to every part of it. The object of the Act of 1923 is to enable a landlord by coming into possession of the whole of a dwelling-house to hold it free from the operation of the principal Act of 1920. There is no authority for saying that when a dwelling-house has once become decontrolled through the landlord coming into possession of the whole of it, that dwelling-house or any part of it can again become controlled. The burden is upon the appellant of showing the contrary, and he has failed to discharge that burden. The dwelling-house let to the appellant is substantially the same dwelling-house as that which was formerly let to Mr. Churchman, inasmuch as it consists of the same rooms with one immaterial exception, and it is therefore a decontrolled dwelling-house. Even if it be regarded as consisting of part only of the dwelling-house formerly let to Mr. Churchman, it is decontrolled, since the decontrol of the whole must involve the decontrol of the part. The question whether a dwelling-house is, on the one hand, identical with or part of a previously decontrolled dwelling-house, or, on the other hand, a new controlled dwelling-house, is a question of fact, and in the present case the county court judge has found that the appellant's dwelling-house is the same as or part of the dwelling-house formerly let to Mr. Churchman. It follows that the appellant's dwelling-house is decontrolled, and that he is not entitled to an apportionment of rent under s. 12, sub-s. 3, of the Act of 1920.

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(1) (1927) 44 Times L. R. 94.

(2) [1927] 1 K. B. 865.

(3) [1926] 1 K. B. 360.

(4) (1927) 64 L. J. C. C. Rep. 58.

(5) [1922] 1 K. B. 393.

(6) [1923] 1 K. B. 245.

(7) [1925] 2 K. B. 713.

(8) [1922] 1 K. B. 222.

(9) See note (1) ante, p. 365.

SALTER J. Notwithstanding the excellent argument of counsel for the respondent, I think that this appeal should be allowed. The question raised is whether, where a dwelling-house has been decontrolled under the Rent and Mortgage Interest Restrictions Act, 1923, s. 2, sub-s. 1, so that the principal Act ceases to apply to that dwelling-house, it is right

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(1) See note (1) ante, p. 365.

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to say that the principal Act cannot apply to any other new dwelling-house which may thereafter be created by the letting of a part of the dwelling-house which has been decontrolled.

The facts of this case are simple. Mrs. Cook was the owner of a long lease of the house No. 14 Eversholt Street, N.W. She let three rooms on the third floor of that house to a Mr. Churchman. These rooms so let were undoubtedly a dwelling-house, and they were also a dwelling-house to which the Rent Restriction Acts applied. Mr. Churchman's tenancy of that dwelling-house came to an end by his vacating it on August 12, 1926. Mrs. Cook, as landlord, thereupon took possession of these three rooms. She prepared one of them for the use of her son, and he occupied it when it was ready. She had the other two rooms whitewashed and papered with a view to letting them. She shortly afterwards let these two rooms to the appellant, whose tenancy began on August 28, 1926. It is to my mind plain that the letting by her to Mr. Lloyd of these two rooms was the letting by her to him of a dwelling-house. On August 10, 1927, Mr. Lloyd made an application to the county court under the Act of 1920, s. 12, sub-s. 3, for an apportionment of the standard rent of the whole house for the purpose of determining the standard rent of his dwelling-house consisting of these two rooms. That sub-section provides that where, for the purpose of determining the standard rent of "any dwelling-house to which this Act applies," it is necessary to apportion the rent, the county court may on application by either party make such apportionment as seems just. The first question, therefore, is whether Mr. Lloyd's dwelling-house consisting of these two rooms, his tenancy of which related him to Mrs. Cook as landlord, is a dwelling-house to which the Act of 1920 applies. In order to ascertain whether it is a dwelling-house of that description, reference must be made to s. 12, sub-s. 2, which provides: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed" the limits there prescribed, "and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies." These two rooms are "a part of a house let as a separate dwelling" within the meaning of that sub-section, and the rent does not exceed the prescribed limits. It follows that they are a dwelling-house to which the Act of 1920 applies. In the absence therefore of any other provision to the contrary, Mr. Lloyd is entitled to an apportionment of the rent under sub-s. 3.

It is said, however, that he is not entitled to an apportionment because his dwelling-house has been decontrolled under the Act of 1923, s. 2, sub-s. 1, which provides: "Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house." As I think I have observed on former occasions, it is necessary in cases under these Acts to have regard to the dwelling-house, and the landlord and the tenant, who are related together by the tenancy. There can be no doubt, as I have already said, that the three rooms which were let to Mr. Churchman constituted a dwelling-house to which the principal Act of 1920 applied. When his tenancy of that dwelling-house came to an end Mrs. Cook was the landlord of that dwelling-house, and she came into possession of the whole of it. The principal Act therefore ceased to apply to that dwelling-house, and it became decontrolled. That appears from the Act of 1923, or at all events from the case of *Dunbar* v. *Smith*. (1) Because that dwelling-house was decontrolled, it does not, however, follow that Mr. Lloyd's dwelling-house, consisting of the two rooms which were let to him, is also decontrolled. In my opinion it is not. The case of *Cohen* v. *Gold* (2), though not a direct authority in the present case, is very much in point. There

(1) [1926] 1 K. B. 360.

(2) [1927] 1 K. B. 865.

the landlord of a house was in possession of the whole house when the Act of 1923 was passed. In 1925 he let three rooms to a tenant, these rooms constituting a separate dwelling-house. The question was whether, at the time when the Act of 1923 was passed, he was in possession of the "dwelling-house" constituted by these three rooms within the meaning of s. 2, sub-s. 1, of the Act, so that it then became decontrolled. The Divisional Court held that he was not at that time in possession of that dwelling-house, or in possession of it in the capacity of landlord, and that it was not therefore decontrolled. That decision is so far in point in the present case that it would be an authority for holding that Mr. Lloyd's dwelling-house is not decontrolled, unless the previous decontrol of Mr. Churchman's dwelling-house makes a difference. To my mind the previous decontrol of Mr. Churchman's dwelling-house is irrelevant to the question which arises in this case. That question is whether Mr. Lloyd's dwelling-house is decontrolled. Counsel for the respondent said that it was a question of fact. He submitted that the letting to Mr. Lloyd of two of the three actual rooms formerly let to Mr. Churchman was not the letting of a fresh dwelling-house, but was the letting of the same dwelling-house less one room. That does not appear to me to be a tenable view. To my mind when the two rooms were let to Mr. Lloyd an entirely new dwelling-house came into existence consisting of these two rooms only. If that be so, the question then comes to be whether that new dwelling-house has been decontrolled. In my opinion it has not.

I assent to the judgment of the learned county court judge, except the last two lines of it. I agree with him that on the termination of Mr. Churchman's tenancy Mrs. Cook came into actual possession of the whole of the dwelling-house within the meaning of s. 2, sub-s. 1, of the Act of 1923, and that thereupon the Acts ceased to apply to it; but I am unable to agree that Mr. Lloyd was not entitled to have the rent of the house apportioned. I think that he is entitled to the apportionment which he claims.

In my opinion the appeal should be allowed, and the judgment of the county court judge should be set aside, and judgment entered for the appellant.

CHARLES J. I am of the same opinion.

Appeal allowed.

Solicitor for appellant: *A'Deane Gent Wood.*
Solicitor for respondent: *E. M. Tringham.*

J. R.

[IN THE COURT OF APPEAL.]

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March 22.

AKTIESELSKABET OCEAN v. B. HARDING AND SONS, LIMITED, AND OTHERS.

[1926. A. 2702.]

Shipping—Bill of Lading—Incorporation of Charterparty—Shipbroker Breach of Duty—Ratification—Validity of Charterparty—Lien for dead Freight and Demurrage—Sale of Goods—C.i.f. Terms—Breach—Circuity of Action.

The plaintiffs, owners of the steamship *D.*, had instructed one H. J., a broker, to procure a charterparty for their ship. H. J. being minded, in breach of his duty as a broker, to make use of the ship for his own ends, purported to effect a charterparty dated August 9, 1926, between the plaintiffs of the one part and an Export Company of Danzig "and others" as charterers of the other part. This document was signed by H. J. "as agent only" for the owners and by the same H. J. "on behalf of the charterers as per separate chartering notes." By one of the clauses of the document the shipowners were to have a lien for all dead freight and demurrage at the port of loading. H. J. had no authority to act on behalf of the Export Company of Danzig, who knew nothing about the transaction.

The defendants, timber merchants in London, had bought from S. & Co., shippers in Danzig, certain red wood at a price including cost, freight and insurance from Danzig to London. S. & Co. engaged cargo space for the wood on board the *D.* by means of chartering notes signed by the said H. J. purporting to act "by order of the owners," but without their authority, and the wood was shipped on board the *D.* at Danzig under bills of lading signed by the said H. J. purporting to act for and on behalf of and with the authority of the master. Each bill of lading incorporated the terms, conditions and clauses of the so-called charterparty of August 9, among which was the lien clause mentioned above. The bills of lading were indorsed by S. & Co. and tendered under the contract of sale to the defendants, who accepted them and paid S. & Co. for the goods.

The *D.* left Danzig without a full cargo several days after the lay days had expired. When she arrived in London the master deposited the wood with wharfingers subject to a lien in favour of the plaintiffs for dead freight and demurrage, and the plaintiffs then brought an action against the defendants for a declaration that they were entitled to the lien.

The judge at the trial inclined to the view that the document of August 9 was a valid charterparty and that the lien clause was effectively incorporated in the bills of lading, but held that if the plaintiffs recovered for dead freight and demurrage against the defendants, the defendants would have a claim for the like amount against S. & Co.; in which case, in his view, S. & Co. would have a claim to recover the same amount against the plaintiffs; and therefore to avoid circuity of action he gave judgment for the defendants:—

Held, that the lien clause in the document of August 9 was incorporated in the bills of lading:—

By the Court (Scrutton and Sankey L.JJ. and Russell J.), on the ground that the plaintiffs, by taking the cargo on board their ship and issuing bills of lading in respect of it after they knew of H. J.'s breach of duty in assuming to charter their vessel to himself, had ratified his act and so validated the charterparty.

By Russell J. on the further ground that the incorporation of the lien clause was not in any way dependent or contingent upon the charterparty being a valid or effective document, for that in the absence of a condition to the contrary, one document, or part thereof, may be incorporated in another although the first document has, of itself, no legal effect whatever.

Held also, by the Court, that the defendants could not support a plea in avoidance of circuity of action, because it is essential to that plea that the amount recoverable by the defendant pleading it from the plaintiff in the action in which it is pleaded should be the exact amount recoverable by the plaintiff from him; but in the present case, as S. & Co. were not parties to the action, it could not be averred that the damages, if any, recoverable by the defendants from S. & Co. for breach of the contract of sale would be the same in amount as the sum recoverable by the plaintiffs from the defendants under the terms of the bills of lading; and that it did not appear that S. & Co. had any cause of action against the plaintiffs whose liabilities depended upon the bills of lading.

Judgment was therefore given for the plaintiffs.

APPEAL from the judgment of MacKinnon J. in an action tried before the learned judge without a jury.

The action was brought by shipowners against indorsees of bills of lading to whom the property had passed in the goods the subject of the bills of lading. The goods had been carried in the plaintiffs' steamship the *Dagali* from Danzig to London and deposited with the Port of London Authority subject to a lien claimed by the plaintiffs for dead freight and demurrage. The defendants lodged with the Port Authority the amount claimed by the plaintiffs and obtained delivery of the goods, and the plaintiffs claimed in the action a declaration that they were entitled to a lien upon the money deposited to the amount of 316*l.* 14*s.* 5*d.*

The facts were as follows: On August 9, 1926, the plaintiffs, the owners of the *Dagali*, telegraphed to one Hagen Jorgensen at Danzig asking him to procure a charterparty for the steamer. On August 12 Jorgensen sent to the plaintiffs three copies of what purported to be a charterparty in the form of the Chamber of Shipping Wood Charter (Scandinavia and Finland) to the United Kingdom, 1924, known in the timber trade as the Scanfin charter. It purported to be between Messrs. Eiv. Evensen Aktieselskabet Oslo as agents for the plaintiffs and Messrs. Danziger Holzexport, Isidor Goldberger and others as charterers. The material clauses were numbered 1, 5, 15 and 18, and they provided as follows:—

1. That the vessel should proceed to Danzig and there load a full and complete cargo of mill-sawn red or white fir deals, battens or boards, and proceed therewith to London, Surrey Commercial Dock, and there deliver the same upon being paid freight for deals and battens 2*s.* 6*d.* and for boards 2*s.* 9*d.* per St. Petersburg standard hundred of 165 cubic feet.

5. That at the loading port the cargo should be brought alongside the vessel at the charterers' risk and expense at the rate of 90 standards per weather working day; that it should be loaded with customary steamship dispatch as fast as the vessel could receive during the ordinary working hours of the port, but according to the custom of the port, Sundays and general or local holdidays excepted unless used; and that any dispute arising at the port of loading should be settled before bills of lading were signed or otherwise the claims should be indorsed upon the bills of lading, and if for any reason the master were prevented from indorsing a claim he should telegraph notice of the claim and the amount thereof to the charterers.

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15. That should the vessel not be loaded or discharged with dispatch as provided whereby she should be detained, demurrage should be paid at the rate of 30*l.* sterling per day and pro rata for any part of a day.

Clause 18 was in these words: "The master or owners shall have an absolute lien upon the cargo for all freight, dead freight, demurrage," and other charges.

The document was signed: "By telegraphic authority from Messrs. Eiv. Evensen A/S Oslo as owners' agents (Signed) Hagen Jorgensen as agent(s) only," and "On behalf of the charterers as per separate chartering notes (Signed) Hagen Jorgensen."

Hagen Jorgensen had no authority whatever to sign a charterparty as agent for or otherwise on behalf of Danziger Holzexport Isidor Goldberger or any one else. He was speculating in freights, and the only charterer, assuming that the document had any validity at all, was himself.

On August 6 a firm of Steppat & Co., G.m.b.H. (1), of Danzig had sold through Messrs. Spencer, Lock & Co., of London, to the defendants, Arnold & Co., 4098 pieces of redwood at a price to include cost, freight and insurance to London. On August 17 Steppat & Co. sold through the same agents to the defendants, B. Harding & Sons, Ld., two parcels, one of 1069 pieces and the other of 4056 pieces, on the same terms.

Steppat & Co. engaged cargo space on board the *Dagali*, and obtained shipping notes from Jorgensen. One was in these terms: "August 14, 1926. To George Steppat & Co., G.m.b.H., Danzig. I confirm to you herewith having reserved space in the steamship *Dagali* or substitute expected ready to load on August 20 (force majeure, etc., excepted) for 250–350 standards deals and battens loaders' option from Danzig to London, Surrey Commercial Dock. Freight 44*s.* 6*d.* per delivered St. Petersburg standard. Note:—Conditions as per New Scanfin . . . . to load Bergford Althof. By order of the Shipowners Hagen Jorgensen (Signed) Neander." The second was as follows:

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(1) Gesellschaft mit beschränkter Haftung [equivalent to Limited].

"September 2, 1926. To George Steppat & Co. . . . . I confirm herewith to you having reserved space in steamship *Dagali* now loading (force majeure, etc., excepted) for about 100 standards deals battens from Danzig to London, Surrey Commercial Dock. Freight 42*s*. per delivered St. Petersburg standard. Note: Conditions as per New Scanfin . . . . to load Bergford Althof. By order of the shipowners Hagen Jorgensen (Signed) Neander."

The wood which had been sold by Steppat & Co. to the defendants was shipped on board the *Dagali*, and the plaintiffs issued bills of lading in respect of it, among which were three bills of lading dated August 26 for 1069, 4056 and 4098 pieces of redwood. Each bill of lading was headed: "Bill of lading according to Chamber of Shipping Wood Charter (Scandinavia and Finland) to the United Kingdom, 1924, except clause 10." It stated that the goods, so many pieces and so many standards of red wood, had been "shipped at Danzig in good order and condition by Steppat & Co. . . . . on the *Dagali* then lying at Danzig and bound for London as per charter dated August 9, 1926," and that the goods were "to be delivered . . . . unto order or assigns," he or they paying freight for the same at so much per standard. Each bill of lading also contained these words: "All the terms, conditions, clauses and exceptions contained in the said charterparty apply to this bill of lading and are deemed to be incorporated therein"; and each was signed "For and on behalf and with the authority of the master, Hagen Jorgensen."

In pursuance of their contracts with the defendants Steppat & Co. indorsed to the defendants B. Harding & Sons, Ld., the bills of lading for 1069 and 4056 pieces, and to the defendants, Arnold & Co., the bill of lading for 4098 pieces, and the defendants accepted the documents and paid the price of the goods.

Jorgensen had been unable to provide a full cargo for the *Dagali*, and moreover he had detained the vessel beyond the lay days in the hope of finding cargo, in consequence of which dead freight to the amount of 150*l*. and demurrage to the amount of 270*l*. became due to the plaintiffs. Steppat & Co. were in no way to blame for this, as their cargo was loaded well within the lay days, but being among the first cargo to be loaded it was among the last to be discharged, and when the ship arrived in London the master claimed a lien upon it for the dead freight and demurrage. He landed the goods and placed them in the custody of the Port of London Authority, to whom he gave notice that the goods were to remain subject to the lien. The defendants then deposited with the Port Authority a sum to cover the amount claimed and obtained delivery of the goods.

The plaintiffs on December 24, 1926, issued a writ claiming the declaration as above stated.

In answer to the claim the defendants took several points. The first was that the document of August 9, 1926, which purported to be a charterparty, was of no validity at all, and so there was no term in the bills of lading giving the plaintiffs a lien for dead freight or demurrage. The second was that, if the document was a charterparty, and if therefore clause 18 conferring the lien was incorporated in the bills of lading, there must also be incorporated the signature of Jorgensen on behalf of the charterers "as per separate chartering notes"; that these notes showed that Steppat & Co. were only concerned with part of the cargo, and were in no way responsible for the failure to load or delay in loading the ship. Upon the first point the learned judge inclined to the view that the document of August 9, 1926, was a valid charterparty, and consequently that each of the bills of lading incorporated the lien clause. Upon the second point he held that if the plaintiffs had a claim against the defendants the defendants in their turn would have a claim to be indemnified by Steppat & Co., because Steppat & Co. had contracted to give them documents which would entitle them to delivery of the goods in London at the prices named in their contracts of August 6 and 17, and no more. But the plaintiffs could have no claim against Steppat & Co., because the obligation of Steppat & Co. to the plaintiffs was governed by the shipping notes of August 14 and September 2, and had been duly performed. "That being so," said the learned judge in giving judgment, "I think, in order to avoid circuity of action and to avoid the absurd result that the plaintiffs could here recover from the defendants, and the defendants recover from Steppat & Co., and Steppat & Co. recover back from the plaintiffs, that this claim of the plaintiffs should fail."

Judgment was accordingly entered for the defendants.

The plaintiffs appealed.

A. T. Miller K.C. and *Sir Robert Aske* for the appellants. The learned judge has decided in favour of the appellants upon all points except one, and that one was not pleaded or argued by the respondents. Contrary to their contention that the charterparty of August 9, 1926, was an invalid document, having been signed "on behalf of the charterers" without any authority from the persons named as charterers, the learned judge has held that the document was a valid charterparty binding on Jorgensen, and therefore capable of being incorporated in whole or in part in another document, and consequently that there is nothing to prevent the lien clause from being incorporated in the bills of lading and, so far, entitling the appellants to a lien for dead freight and demurrage. But he has held that if the appellants recover from the respondents, the indorsees of the bills of lading, the respondents would have a claim against Steppat & Co., their vendors, who have sold upon terms entitling the respondents to clean bills of lading; but, the learned judge proceeds to hold, Steppat & Co. could never have been made responsible for dead freight or demurrage because their obligation was defined by the shipping notes and not by the charterparty and was duly performed; and so, he concludes, if Steppat & Co. are made to pay they can recover from the appellants; and therefore to avoid circuity of action it must be held that the appellants cannot recover against the respondents. But first, how can any right of action at the suit of the respondents against Steppat & Co. be established in these proceedings? Secondly, if they have a right of action they are not bound to put it in suit, and if they do not put it in suit there is no circuity. Thirdly, a valid plea in avoidance of circuity of action must show that the amount recoverable by the defendant is necessarily the same as that recoverable by the plaintiff: *Walmesley* v. *Cooper* (1); *Charles* v. *Altin* (2); Bullen and Leake, Precedents o Pleadings, 3rd ed. (1868), p. 558; Wms. Saund., 5th ed. (1845), p. 150, note (2). There is nothing to show what damages the respondents would be entitled to for Steppat & Co.'s breach of contract. But fourthly, if the respondents did recover against Steppat & Co. Steppat & Co. could have no claim over against the appellants, because the rights and liabilities of these parties are governed by the bills of lading and not by the shipping notes. The bills of lading confer on the appellants a lien on the cargo and on every part of it: *Porteus* v. *Watney*. (3) Therefore the defence of circuity of action breaks down at several points.

There remains the question whether the bills of lading do include the lien clause in the charterparty of August 9. The respondents contend that, inasmuch as that charterparty does not bind the persons named as charterers, therefore none of its clauses can be incorporated in another document. But that does not follow; a clause may be incorporated, even though it gives no rights or imposes no liabilities upon any one. Precedents in conveyancing exist for the purpose of being incorporated, yet until they are incorporated they have no legal effect. In short the question whether the charterparty of August 9 was or was not a valid document is immaterial. But if it were necessary for the appellants to establish its validity that also can be done. Jorgensen was the appellants' agent to procure a charterer. No doubt that mandate did not authorize him to become the charterer himself; he was however guilty of the irregularity of chartering the ship to himself. But that act was not a mere nullity; it might be ratified by the appellants, his principals; and in fact it was ratified. The correspondence shows that the appellants were aware of what Jorgensen was doing, and with that knowledge they received the cargo on their ship and issued these bills of lading. The respondents accepted the bills containing the clause they object to, and there is no reason why they should not be bound by that clause.

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(1) (1839) 11 Ad. & E. 216.

(2) (1854) 15 C. B. 46.

(3) (1878) 3 Q. B. D. 223.

Le Quesne K.C. and *James Dickinson*; *Le Quesne K.C.* and *H. Stranger* for the respondents. There was no charterparty here at all, and therefore no instrument of which any clause could be incorporated in the bills of lading. The document of August 9 purports to be made by the Danziger Holzexport Isidor Goldberger "and others." The Danziger Holzexport Isidor Goldberger may be eliminated, for that firm never gave authority to any one to enter into a charterparty in their name. If there was any contract of affreightment at all it must be between the "others" and the appellants. The only others possible are Jorgensen and Steppat & Co., and perhaps other shippers who like Steppat & Co. shipped goods under chartering notes. Jorgensen has excluded himself as a contracting party by signing the document "on behalf of the charterers as per separate chartering notes." Steppat & Co. cannot be included, because their chartering notes were not signed until after August 9.

But if Steppat & Co. are to be considered as charterers then their liability is defined by their chartering notes. Accordingly if other clauses of the charterparty of August 9 are incorporated in the bills of lading, the terms of these chartering notes must also be incorporated, for they become part of the contract of affreightment. But Steppat & Co. performed all the terms of the chartering notes; the whole of their cargo was loaded well within the lay days. The clause giving the shipowners a lien for all dead freight and demurrage would be inconsistent with the chartering notes; it could not have been the intention of the parties that it should be incorporated in the bills of lading with the result that those who had punctually performed their obligation to the shipowners should render their goods liable to answer for the default of others.

Again if the document of August 9 had been a valid charter, then since neither the respondents nor their vendors, Steppat & Co., were in any way responsible for the default in loading the ship, the respondents, whose goods have been detained and who have had to pay for the default of other charterers, would have been entitled to be indemnified by those charterers: *Pownal* v. *Ferrand* (1); *Bradshaw* v. *Beard* (2); *Johnson* v. *Royal Mail Steam Packet Co.* (3); *Edmunds* v. *Wallingford.* (4) The appellants by incorporating in their bills of lading a clause of that charterparty impliedly warranted that Danziger Holzexport Isidor Goldberger or some other solvent firm were the charterers. There has been a breach of this warranty. Accordingly the respondents have a claim against the appellants to recover the same amount as the appellants are claiming against them, and the plea in avoidance of circuity of action is a good one.

[The question was also debated whether Jorgensen, although he signed the so-called charterparty of August 9 on behalf of named charterers, was nevertheless liable upon it as a principal, inasmuch as he had no authority to sign it; and *Jenkins* v. *Hutchinson* (5); *Schmaltz* v. *Avery* (6); *Adams* v. *Hall* (7); *Harper & Co.* v. *Vigers Brothers* (8) were cited; but the Court gave no decision upon this point.]

A. T. Miller K.C. in reply.

Cur. adv. vult.

March 22. The following written judgments were delivered:—

SCRUTTON L.J. This appeal raises some troublesome and intricate points on shipping law. The plaintiffs are owners of the steamship *Dagali*, and their claim is for a declaration that certain wood goods carried by the *Dagali*, under bills of lading of which the defendants are indorsees, are subject to a lien (1.) for dead freight in respect of failure to load the *Dagali* with a full cargo at Danzig, (2.) for demurrage at Danzig, the port of loading. The statement of claim is a little obscure, but I think it also claims the amounts on a personal liability apart from lien. MacKinnon J. has taken the view

(1) (1827) 6 B. & C. 439.
(2) (1862) 12 C. B. (N. S.) 344.
(3) (1867) L. R. 3 C. P. 38, 45.
(4) (1885) 14 Q. B. D. 811.
(5) (1849) 13 Q. B. 744.
(6) (1851) 16 Q. B. 655.
(7) (1877) 37 L. T. 70.
(8) [1909] 2 K. B. 549.

that the defendants would be liable, but for the fact that if they paid, they could, in his view, by a rather roundabout process ultimately recover the same amounts from the plaintiffs, and he has, therefore, held that the defence of circuity of action frees the defendants. The shipowners appeal.

The defendants' connection with the matter is that they purchased certain wood goods from Steppat & Co., of Danzig, at a price c.i.f. London, the freight to be paid by buyers as per charter, balance by acceptances or cash against shipping documents. Under this contract of sale Steppat & Co. tendered to the two buyers three bills of lading all dated August 26, 1926, and all signed "Hagen Jorgensen for and on behalf of and with the authority of the master." The buyers took these indorsed bills, and when the goods were deposited with the Port of London Authority to secure the ship's alleged lien for dead freight and demurrage, the buyers presented the bills, and got the goods in exchange for deposit of the sum claimed. This, as explained in *White & Co.* v. *Furness, Withy & Co.* (1), does not make the receiver liable on the bill of lading unless he is an indorsee to whom the property passes, in which case he is liable under the Bills of Lading Act. The defendants were in this position.

The bills of lading describe the goods as shipped by Steppat & Co. on the ss. *Dagali* bound for London as per charter dated August 9, 1926, at a freight of 2*l.* 4*s.* 6*d.* per standard, (the freight in the charter being 2*l.* 6*s.*). Each of the bills of lading also contained the words: "All the terms, conditions, clauses and exceptions contained in the said charterparty apply to this bill of lading and are deemed to be incorporated herein."

Turning to the charter, first as to its parties. It is described as made between brokers as agents for owners, and "Messrs. Holzexport Isidor Goldberger and others of Danzig as charterers." It is signed for the shipowners by "Hagen Jorgensen as agent only," "by telegraphic authority from owners' agents"; it is signed for the alleged charterers by Hagen Jorgensen "on behalf of charterers as per separate

(1) [1895] A. C. 40.

chartering notes." In fact Jorgensen was using this charter as a private speculation of his own, meaning by separate berthing notes to book portions of cargo at a higher freight than the charter provided, and so make a profit. He had no authority whatever from Holzexport Isidor Goldberger to make them parties to the contract; they knew nothing about the charter and shipped no goods by the ship. There were no "others" at the time of signing the charter, unless Jorgensen could be treated as "others." He had not at the time of the charter signed any "separate chartering notes." He did, after the date, sign some chartering notes, at lower rates of freight than those mentioned in the charter, but not enough to provide a full cargo. In particular, on August 14 and September 2, 1926, he signed two berthing notes in favour of Steppat & Co., for from 250–350 standards at 2*l.* 4*s.* 6*d.*, and 100 standards at 2*l.* 2*s.*, containing the words: "Conditions as per new Scanfin," referring to the agreed form of charter of that name. He signed these documents "by order of" or "on behalf of" (both translations are made) "the owners, Hagen Jorgensen." He had no authority from the owners to sign these chartering notes, and did so on his own account and for his own benefit. He only got the goods on board by paying the difference of freight between the above rates and the charter rate to the captain. He signed on behalf of the ship bills of lading incorporating not the mere form of the Scanfin charterparty, but the specific charter form of August 9, but at the bill of lading rate, and not at the charter rate, of freight.

What is the result of this tangle? The question was argued at great length whether there was any valid charter, and, if not, whether the bill of lading could be treated as incorporating nothing, or as incorporating the same terms as were to be found in the actual charter form of August 9, as terms of the bill of lading, binding shippers and receivers.

A cardinal fact of the situation is that Jorgensen is not merely producing himself as a principal charterer, though he has signed as agent for charterers, but is also, being agent for owners, saying, "I have contracted with you as charterer."

An agent employed by his principal to find a purchaser or charterer cannot himself purchase or charter unless he makes full disclosure of his position to the owner. As soon as the owner discovers the true position he may declare himself not bound, or he may adopt the charter or purchase. In my view he is not bound till with knowledge he adopts, and if he is not bound neither is the agent-charterer. The legal bond cannot be tied at one end and loose at the other. In the present case the owners did not know till they received the letter of September 7, probably about September 13, that Jorgensen was acting as charterer, bearing the profit or loss himself, though when they received the telegram of September 8 they would have considerable information on the subject. What action did the owners take then? They sent the ship on the chartered voyage; they carried the goods which Jorgensen had no right to put on board except as a charterer; and they claimed in this action on the basis of an existing and valid charter, which could only be if they treated Jorgensen as "the others" who are described as charterers in the document of August 9. It would, I think, be different if the shippers or indorsees knew who were described as charterers in the charter, and shipped goods in reliance on those names. But this did not happen. Steppat & Co. accepted berthing notes binding them by Scanfin terms and accepted without protest bills of lading incorporating the dated charter; the receivers never saw the charter and did not rely on its parties, and had their goods carried under its terms, which had been incorporated. This view relieves me from discussing whether against unwilling owners Jorgensen could have claimed to be a party under the charter, or whether owners repudiating the charter against Jorgensen could yet have claimed the charter terms against the shippers or indorsees.

If, after the charter has been adopted by the owners as a charter with Jorgensen, the receivers cannot rely on its alleged invalidity as preventing the incorporation of its terms in the bills of lading, how much of the charter is incorporated in the bills of lading? The words of incorporation have gradually become wider and wider since *Serraino & Sons* v. *Campbell.* (1) Originally they were "he (the consignee) paying freight and (performing) all other conditions of the charter," in which form they were limited to conditions to be performed by the consignee, and did not incorporate exceptions. The present words "all terms, conditions, clauses, and exceptions" are very wide, but similar words have been limited to exclude obligations of the charter inconsistent with express obligations of the bill of lading. Thus the obligation of the charterer to pay lump sum freight on a full or part cargo delivered has not been held incorporated in a bill of lading providing for payment of a specified freight per ton delivered: *Fry* v. *Chartered Mercantile Bank of India, London, and China* (2); *Gardner & Sons* v. *Trechmann* (3); and *Red "R" Steamship Co.* v. *Allatini.* (4) The bill of lading binds the receiver to pay freight only on his cargo and at the bill of lading rate, and the lien is only for that amount. I should have been disposed to extend this principle to liens for dead freight claimed against a shipper of part of the cargo, who has shipped all the cargo he contracted to ship, but I am prevented from doing so by the decision of the House of Lords in *Kish* v. *Taylor Sons & Co.* (5), where a similar point was argued and the contention negatived. In the same way the decision in this Court in *Porteus* v. *Watney* (6) prevents any apportionment of demurrage claims amongst consignees of part cargo. I should therefore arrive at the same result as MacKinnon J., that the consignees were liable in the present case to the liens claimed on their goods.

But the learned judge freed them from this liability on a ground not pleaded, and, in the form stated by him, of his own suggestion. It was that if the shipowner recovered from the consignees here, the consignees would be entitled to recover the amount from Steppat & Co., and Steppat & Co. would be entitled to recover the amount from the shipowners, and that this as avoiding circuity of action would be a good defence to the shipowners' claim. This involved determining the rights and liabilities of Steppat & Co., who were no parties to the proceedings. I know of no case, and counsel could refer me to none (1), where avoiding circuity of action has been held good as a defence, except where the supposed cross-claim arose directly between the parties to the proceedings in which it was used as a defence. The defence had to be used at a time when it was not possible to counterclaim in a proceeding in which a claim was made, and it was strictly limited to cases where, if the plaintiff recovered against the defendant, the defendant could recover exactly the same sum, or if damages, exactly the same measure of damages, against the plaintiff: see *Turner* v. *Davies*, 2 Williams' Saunders, p. 150, especially note (2.); and Bullen and Leake, 3rd ed., p. 558. Here the defendants could not recover the sum claimed directly from the plaintiffs. It is suggested that as they had bought c.i.f. from Steppat & Co., if the contract of carriage which Steppat & Co. tendered them included a liability on liens for dead freight and demurrage, they could recover the amount from Steppat & Co. How is this Court to determine this in the absence of Steppat & Co., and without the matter being pleaded? It is then suggested that Steppat & Co., who primarily made a contract with Jorgensen in different terms from the charterparty, a contract which Jorgensen had no authority from the shipowners to make, can recover from the shipowners any sums claimed by liens which were inconsistent with, or not warranted by, the terms of their contract with Jorgensen. But the terms of Steppat & Co.'s contract with the shipowners are determined by the bills of lading, and the shipowners are not bound to Steppat & Co. by any contract made by Jorgensen in the chartering notes. In my opinion there is no foundation for the defence based on avoiding circuity of action suggested by the judge.

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(1) [1891] 1 Q. B. 283.
(2) (1866) L. R. 1 C. P. 689.
(3) (1884) 15 Q. B. D. 154.
(4) (1909) 14 Com. Cas. 82.
(5) [1912] A. C. 604, 621, 622.
(6) 3 Q. B. D. 223.

(1) As to *Turner* v. *Davies* (1670) 2 Wms. Saund. 150, it may be observed that there, if the defendant, the superseded administrator, had satisfied his judgment against the plaintiff it would have been the duty of the newly appointed administrator to recover from him what he had recovered from the plaintiff. No such duty bound Steppat & Co. in the present case.

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Apparently feeling this difficulty the respondents made a suggestion at the hearing of the appeal that there was really a direct claim by the consignees against the shipowners on the ground of an implied warranty by the shipowners that the named charterer Holzexport Isidor Goldberger was a party to the charter. It is perhaps sufficient to say that this was never pleaded or considered by the judge, and I decline to consider it for the first time in the Court of Appeal. It was also said that the respondents by letters just before trial had given notice that they intended to apply for leave to counterclaim, and that the counterclaim was something like that above suggested. As read from the transcript, when put forward by Mr. Dickinson, it was not the same cause of action as above suggested, and no leave to counterclaim was ever given or applied for. Again I decline to consider the matter for the first time in the Court of Appeal. The result is that while agreeing with the result of the first part of the learned judge's judgment, I cannot accept his conclusion negativing that result on the basis of avoiding circuity of action.

The appeal must therefore be allowed, and judgment must be entered for the appellants with costs for a declaration in the terms of the statement of claim, except that 270*l.* is the amount for which the lien is sustainable, which sum once paid by either of the respondents the lien is discharged. The appellants must have the costs of the appeal.

Sankey L.J. (1) The plaintiffs in this case claimed against the defendants as indorsees of bills of lading certain sums for dead freight and demurrage in respect of a consignment of wood carried by them in the steamship *Dagali* from Danzig to London. The vessel left Danzig upon September 8, and on her arrival with the wood in question at the Surrey Commercial Docks, the plaintiffs claimed to exercise their lien for the amount due to them. The defendants deposited a sufficient sum to answer the claim. The cargo was then released, and the question for determination in the action was to what part, if any, of the sum deposited the plaintiffs were entitled.

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(1) The judgment of Sankey L.J. was read by Scrutton L.J.

The facts are as follows: A man of the name of Jorgensen signed a charterparty at Danzig on August 9, 1926, in the following terms: "By telegraphic authority from Messrs. Eiv. Evensen Aktieselskabet Oslo as Owners' agents. (Signed) Hagen Jorgensen, as agent only." "On behalf of Charterers as per separate chartering notes, (Signed) Hagen Jorgensen." The charter was expressed to be between Eiv. Evensen Aktieselskabet Oslo, as agents to the owners, and Messrs. Holzexport Isidor Goldberger and others, of Danzig, as charterers, and by clauses 1, 5, 15 and 18, it was provided [The clauses were read and the judgment proceeded:]

In fact Jorgensen had no authority at all on behalf of Holzexport I. Goldberger. He was speculating in freights, and hoped to make a profit by getting persons to ship wood at rates higher than the charterparty rates. He did induce some persons to ship, amongst them Messrs. Steppat & Co., of Danzig, to whom he gave shipping notes after the date of the signing of the charterparty. For example, on August 14, 1926, he signed the following note: "To George Steppat & Co. G.m.b.H. Danzig, I confirm to you herewith having reserved space in the steamship *Dagali* or substitute expected ready to load on August 20 (force majeure, etc., reserved) for 250–350 standards deals and battens, loaders' option, from Danzig to London S. C. D. Freight rate 44*s.* 6*d.* per delivered St. Petersburg standard. Note:—Conditions as per New Scanfin . . . . to load Bergford Althof. By order of the shipowners, Hagen Jorgensen Neander." On September 2, 1926, he signed another in this form: "To George Steppat & Co. G.m.b.H. Danzig. I confirm herewith to you having reserved space in the steamship *Dagali* now loading (force majeure, etc., reserved) for about 100 standards deals battens from Danzig to London S. C. D. Freight rate 42*s.* per delivered St. Petersburg standard. Note: Conditions as per New Scanfin . . . . to load Bergford Althof. By order of the shipowners Hagen Jorgensen Neander."

Steppat & Co. loaded the wood referred to in these notes, and the master gave them bills of lading dated August 26,

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which contained the following words: "All the terms, conditions, clauses and exceptions contained in the said charterparty"—i.e., the charterparty of August 9, 1926—"apply to this bill of lading and are deemed to be incorporated herein, including the liberties under clauses 7 (*c*) and (*d*), 8 (*d*), and 12 (*b*) thereof." Owing to Jorgensen's failure to provide a cargo, not only was the vessel delayed but she sailed short of her full complement. The defendants are the indorsees of those bills of lading and the plaintiffs seek to make them liable for the dead freight and demurrage at the port of loading.

Three points were taken for the defendants: (1.) That under the circumstances the charterparty had no effect in law because Jorgensen had no authority to make it, as alleged; it was a non-existent document and therefore the bills of lading did not incorporate it, and the only protection afforded to the vessel was that accorded her by the law of her flag. (2.) That if the charterparty had any effect in law and was incorporated in the bills of lading, the shipping notes must also be incorporated, and that as Messrs. Steppat & Co. shipped the full amount for which they reserved space on the said vessel, no liability can remain on them or upon the defendants for either dead freight or demurrage. (3.) That the plaintiffs were estopped from bringing their claim by reason of the fact that if the charterparty is to be incorporated in the bills of lading, it provided that any dispute arising thereon should be settled before signing bills of lading, otherwise claims should be indorsed upon the bills, and as this was not done, the plaintiffs represented there were no such claims.

The learned judge apparently decided against the defences pleaded, but held that if the plaintiffs were entitled to anything, the amount for dead freight was 150*l.* and the amount for demurrage 120*l.* He however took a point, which is not to be found upon the pleadings in any shape or form, of the following nature. He said that if the plaintiffs could recover against the defendants the defendants could recover from Steppat & Co., and Steppat & Co., in their turn, could recover against the plaintiffs; or, as it was put in the alternative, that there was an implied warranty by the plaintiffs that

Holzexport Isidor Goldberger was a party to the charterparty, and therefore the defendants could sue the plaintiffs for breach of implied warranty; that in either case the defendants could recover from the plaintiffs any sum which the plaintiffs might obtain from them; and so in order to avoid circuity of action, he gave effect to this contention and decided in favour of the defendants.

We were invited to walk along many interesting avenues of shipping law, and the arguments necessarily had to be conducted on different hypotheses of fact. Difficult questions were suggested of the admissibility of evidence to show that Jorgensen was or was not a principal under the peculiar circumstances of the case. Equally difficult questions arose whether a defence could be found by incorporating into the bills of lading a document which might or might not be a valid charter. In my view many of these difficulties do not fall for determination when once the true facts are ascertained. The most important fact is that which answers the question, was the charter a valid and binding document? In my view it was. The date of the charterparty is August 9. The vessel arrived at Danzig on August 24, and was in all respects ready to load by noon of that day. Long before the loading was completed the master became aware of the unsatisfactory character of Jorgensen's position. By a letter dated September 7, and another of September 10, he wrote a lengthy account of the situation to his owners. It is true that neither of those letters would have been received at Oslo for several days after their date, but in addition to these letters he sent a telegram on September 8 to his owners, which presumably reached them on the same day. In my view there is abundant evidence that with a knowledge of the facts the owners ratified the charter, and that in law Jorgensen must be presumed to be one of the " others " on whose behalf the charter was made. The owners allowed the loading to proceed; they never objected; they carried out the voyage, and assumed that Jorgensen was the charterer. In these circumstances I am of opinion that the charterparty was a valid contractual document.

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I turn now to a consideration of the points taken. It will be convenient to deal with them in the reverse order. The third point raised the question of estoppel. Upon this I agree with the learned judge. He finds the defendants were not induced to take up the bills of lading by reason of any such supposed representation, and even if they had this claim in mind they would not be justified in assuming from the cleanness of the bill of lading that there could be no claim for demurrage or dead freight, because non constat the master having been prevented from indorsing, had not telegraphed notice of his claim to the charterers.

With regard to the second, the incorporation of the shipping notes, I am unable to agree that these notes were incorporated into the contract between plaintiffs and defendants. Jorgensen had no authority to make these notes on behalf of the plaintiffs, the master was in fact issuing bills of lading —namely, those sued upon—and it was not possible for Jorgensen to issue shipping notes which were in conflict with them. He was making these notes for himself and on his own account.

As to the first point, what was incorporated in the bill of lading ? Now it will be observed that the words of incorporation are very wide. " All the terms, conditions, clauses and exceptions contained in the said charterparty apply to this bill of lading and are deemed to be incorporated therein." In my view these words incorporated the loading and demurrage clauses (clauses 1, 5 and 15), and the lien for dead freight and demurrage clause (clause 18) : see *Kish* v. *Taylor Sons & Co.* (1), where the bill of lading holder was bound by a clause in the charterparty giving a lien for dead freight ; *Gray* v. *Carr* (2), where the bill of lading holder was held liable for charterparty demurrage at port of loading ; and *Porteus* v. *Watney* (3), where the bill of lading holder was held liable for demurrage at port of discharge. In my view the plaintiffs were entitled to succeed in their claim.

So far I am in agreement with the learned judge, and I now

(1) [1912] A. C. 604, 614.

(2) (1871) L. R. 6 Q. B. 522.

(3) 3 Q. B. D. 223.

proceed to the consideration of circuity of action which induced him to decide in favour of the defendants. Since the Judicature Acts gave facilities for counterclaim and third party procedure, the doctrine of circuity of action has neither been as necessary nor as frequently resorted to as in former years: *Stooke* v. *Taylor* (1); *Stumore* v. *Campbell & Co.* (2); *McCheane* v. *Gyles.* (3) In the third edition of Bullen and Leake's Precedents of Pleadings, published in 1868, the law is on p. 558 accurately stated as follows: "Wherever the rights of the litigant parties are such that the defendant would be entitled to recover back from the plaintiff the same amount of damages which the plaintiff seeks to recover, the defendant may plead the facts which constitute such right as a defence, for the purpose of avoiding circuity of action. . . . . A claim for unliquidated damages cannot be so pleaded, where the measure of damages is not necessarily identical in both cases. . . . . Nor can a mere cross-claim for unliquidated damages be pleaded as a defence on equitable grounds": *Walmesley* v. *Cooper.* (4) It must clearly be shown that the same sum which the plaintiff sues for can in turn be recovered from him. The most familiar application of the doctrine is to be seen in certain actions on bills of exchange. In recent times an example is *The Glenfruin* (5), where, however, the point was expressly taken in the counterclaim and was maintainable on the facts. In the present case neither of the pleas relied upon to bring into operation the doctrine appeared on the pleadings. One was taken by the learned judge; the other, which involved the breach of warranty of authority, was put forward for the first time in this Court. In my view, as to the first plea, it is not clear that the doctrine applies on the facts, and it is doubtful whether the damages recovered by the plaintiffs are such damages as are recoverable from them, without knowing the rights and position of the other parties affected. Jorgensen had no authority from the plaintiffs to grant the shipping notes to Steppat & Co., and as between

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(1) (1880) 5 Q. B. D. 569, 576.
(2) [1892] 1 Q. B. 314.
(3) [1902] 1 Ch. 287.
(4) 11 Ad. & E. 216.
(5) (1885) 10 P. D. 103.

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Steppat & Co. and the plaintiffs the bills of lading are the governing documents. As to the second plea, the case against it is even stronger when it is remembered that it was not taken in the Court below. I think that the judgment of the learned judge on the facts and pleadings presented to him by the parties was correct, that the point of circuity of action was not open on the pleadings or justified by the facts, and that the appeal should be allowed, with costs.

RUSSELL J. I do not propose in this judgment to deal with the question whether the charterparty was a document binding on the shipowners. I am content to follow the views expressed on this point by the other members of the Court. Neither do I wish to add anything as regards the point upon which the learned judge in the Court below decided this case. I desire however to make some observations upon other aspects of the case.

The action is founded on three bills of lading, of two of which the defendants B. Harding & Sons, Ld., were indorsees; the defendants Henry Arnold & Co. were indorsees of the third bill of lading. The bills of lading were issued by the plaintiffs to the shippers, Steppat & Co., and under or by virtue of their provisions the plaintiffs claim to be entitled to a lien on the cargo covered thereby for (*a*) demurrage at port of loading, and (*b*) dead freight. For the sake of simplicity I will deal with the bill of lading for 4098 pieces of redwood, of which the first defendants are indorsees, and which is in these terms: " Shipped at Danzig in good order and condition by Steppat & Co. G.m.b.H. of Danzig in and upon the good steamship called the *Dagali* whereof is master Johnston for this present voyage, now lying in Danzig and bound for London, S. C. Dk., via other loading ports, as per charter dated August 9, 1926." Then follows a deviation clause, and then follows a description of the cargo covered by the bill of lading: " And to be delivered in the like good order and condition at the foresaid Port of London unto order or assigns, he or they paying freight for the same at 44/6 p. std. of 165 cb. ft. Engl. All the terms, conditions, clauses and exceptions contained in the said charterparty apply to this bill of lading and are deemed to be incorporated herein, including the liberties under clauses 7 (*c*) and (*d*), 8 (*d*), 11 and 12 (*b*) thereof." The bill of lading thus in express terms incorporates all the terms, conditions, clauses and exceptions contained in "the said charterparty," that is to say, the charter dated August 9, 1926, "as per" which the *Dagali* then lying in Danzig was bound for London. There would therefore normally be incorporated into the bill of lading (so as to create rights and liabilities as between the shipowner and the shipper) all conditions in the charterparty not inconsistent with the bill of lading which are relevant to the right to take delivery of the cargo. Prima facie therefore there would arise as between the shipowners and the shippers by virtue of the bill of lading (which is to be read as containing clauses in the terms of clauses 15 and 18 of the charterparty) a lien in favour of the shipowners for demurrage and dead freight upon the goods covered by the bill of lading. The indorsees of the bill of lading become, under s. 1 of the Bills of Lading Act, 1855, subject to that liability in respect of such goods as if the contract in the bill of lading had been made with themselves.

It was however contended on behalf of the defendants that there was no effective incorporation into the bill of lading of any provisions of the charterparty, because that which was referred to as a charterparty was in truth no charterparty at all; and this for the reason that upon the facts of this case no rights or liabilities were created or arose thereunder. This contention seems based upon the view that the incorporation into the bill of lading of the provisions of a particular document is in some way dependent or contingent upon that document being an effective document as between the parties to it. This contention is, in my opinion, unsound. The incorporation of the provisions of a document executed between A. and B. into a document executed between B. and C. does not (unless the incorporation or the document between B. and C. is expressly made conditional on that event) depend upon the existence of rights and liabilities as between A.

and B. The incorporation of the terms is merely a shorthand method of expressing and creating rights and liabilities as between B. and C. by reference to the language of some other document. The document which contains the reference is to be read as if the wording of the document referred to were repeated therein, so as to create rights and liabilities as between the parties thereto. The document referred to need not even be a document which purported to create rights or liabilities; it may be merely a printed form.

The next contention by the defendants was that if you incorporate the terms of the charterparty, you must also incorporate the signatures to it. I confess that this contention puzzles me. The incorporation of the terms of the charterparty is not done for the purpose of introducing into the bill of lading rights and obligations as between the parties to the charter, but for the purpose of creating rights and obligations as between the parties to the bill of lading by reference to language in another document. I do not see what the signatures of the parties to the charterparty have to do with this. It is true that in *Hutchinson* v. *Tatham* (1) Brett J. uses language which at first sight seems to treat the signature to a contract as part of its terms. But the points to which he was directing attention in that case were the words or terms in the particular contract which showed that the defendants had only purported to contract as agents. These were to be found both in the body of the document (it being expressed to be made by the defendants "as agents to merchants") and in the signature by the defendants, which was also expressed to be by them "as agents to merchants." The passage in no way authorizes or warrants the incorporation of signatures in the present case. Notwithstanding that passage, I have no doubt that where document B. provides that "all the terms, conditions, clauses, and exceptions" contained in document A. shall apply to document B. and are deemed to be incorporated in document B., the signatures to document A. are not incorporated. How can they "apply" to document B.? They have nothing to do with it. Let me

(1) (1873) L. R. 8 C. P. 482, 487.

assume however that the signatures to the charterparty are incorporated in the bill of lading. Then, say the defendants, you must incorporate the shipping notes. The charterparty is signed on behalf of the charterers thus: "On behalf of the charterers as per separate chartering notes, signed, Hagen Jorgensen." The defendants contend that this must be read as meaning that the charterparty is subject to the provisions of separate notes, and such separate notes must be incorporated in the bill of lading accordingly. I should have thought that the more natural meaning of the signature is that Jorgensen's authority to sign the charter on behalf of the charterers is to be found in separate chartering notes. I will however assume the defendants' interpretation to be correct. At this stage it is necessary to recall a few facts. The charterparty is dated August 9, 1926. As we know, Jorgensen had got no charterer except himself. He was hoping to make a profit out of his speculation in freights. At that date no separate notes had, so far as we know, been issued; certainly the separate notes relied on here had not been issued. On August 14, 1926, Jorgensen purported to sign and issue to Steppat & Co. a separate note in terms, of which the following is a translation: "I herewith confirm that I have reserved a space for you in the ss. *Dagali*, which will probably be ready to load about August 20 (the Act of God, etc., excepted) for 250/350 standards deal/battens shipper's option from Danzig to London S. C. D. Freight rate: 44/6 per delivered St. Petersburg standard. Remark: Conditions as per New Scanfin ex notice"—that means without clause 2—"ex clause 10, to be loaded Bergford Althof." Jorgensen had no authority to sign or issue such a document on behalf of the shipowners. But it should be observed that the separate note incorporates the conditions of "New Scanfin," that is, the printed form which forms the basis of the document of August 9, 1926. This was followed by the bill of lading which was issued by the plaintiffs to Steppat & Co. on August 26, 1926. The contention of the defendants is that Steppat & Co. can have been under no liability to the shipowners which was inconsistent with the provisions of the separate notes; that

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Steppat & Co.'s liability to provide cargo being limited by the separate notes, and having been discharged, they can have been under no liability for dead freight. Incidentally this argument does not touch liability for demurrage. In my opinion, one answer to this contention is, even assuming the contract between the shipowners and Steppat & Co. to include the provisions of the separate notes, there is nothing inconsistent in those provisions with the shippers' cargo being subject to a lien for dead freight. I see no reason why the two liabilities should not exist together—namely, a liability to supply only a portion of the cargo and a liability of the cargo so supplied to be subject to a lien for dead freight. In any event the contention affords no answer to the claim in respect of demurrage. In my opinion however the separate notes form no part of the contract between the shipowners and Steppat & Co. Still less do they form any part of the contract between the plaintiffs and the defendants. The only contract is the bill of lading, which by its express terms (those terms being incorporated by reference) makes the holders of the bill of lading liable if a full cargo is not loaded, and imposes upon their cargo a lien to secure both dead freight and demurrage: *Kish* v. *Taylor Sons & Co.* (1); *Porteus* v. *Watney.* (2) The appeal must accordingly be allowed and judgment must be entered for the plaintiffs as indicated by Scrutton L.J.

Appeal allowed.

Solicitors for appellants: *Botterell & Roche.*

Solicitors for respondents: *Thomas Cooper & Co., for B. Harding & Sons, Ld.; Trinder, Kekewich & Co., for Henry Arnold & Co.*

(1) [1912] A. C. 604.

(2) 3 Q. B. D. 223.

W. H. G.

ASHBY-DE-LA-ZOUCH GUARDIANS *v.* SUMMERS.

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March 6.

Poor Law—Relief—Loan—Repayment—Complaint—Statutory Period—Time when Matter of Complaint arose—Poor Law Amendment Act, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *ss.* 58, 59—*Summary Jurisdiction Act,* 1848 (11 *&* 12 *Vict. c.* 43), *s.* 11.

By the Summary Jurisdiction Act, 1848, s. 11: "In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." Between June and October, 1926, the appellants, who were guardians of the A. Union, gave relief amounting to 5*l.* 3*s.* 6*d.* by way of loan to a poor person named Summers, under the Poor Law Amendment Act, 1834, s. 58. Demand for repayment was made on February 10, 1927, and on August 6, 1927, an application and information was laid against Summers' employers under the Poor Law Amendment Act, 1834, s. 59, for an order that they should pay to the appellants any wages due to Summers, in discharge of the sum due from him. The justices dismissed the summons as being out of time under the Act of 1848, s. 11 (supra):—

Held, that the application was a "complaint" within the Summary Jurisdiction Act, 1848, s. 11, and that the limits of time imposed by that section must be observed.

Held also, that the complaint here was in time, because the six months' period for the purpose of the Poor Law Amendment Act, 1834, s. 59, began to run from the date of the demand for repayment on February 10, 1927, and not from the date when the relief was given.

Per Salter and Roche JJ. *Quaere*, whether a matter of complaint can be said to have arisen for the purpose of the Poor Law Amendment Act, 1834, s. 59, until there is an actual master or employer in existence from whom the wages due to the poor person can be recovered.

CASE stated by justices for the county of Leicester.

At a court of summary jurisdiction sitting at Ashby-de-la-Zouch an application and information was preferred by one Samuel Bacon, the relieving officer for the guardians of the poor for the Ashby-de-la-Zouch Union (appellants), under the Poor Law Amendment Act, 1834, s. 59 (1), against Harry Summers and the Measham Collieries, Ld. (respondents),

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(1) By the Poor Law Amendment Act, 1834, s. 58, provision is made for the grant of relief by way of loan.

Sect. 59 of the same Act provides: "In all cases where any relief shall have been given by way of loan, or where any relief, or the cost price thereof, shall be treated as a loan . . . . it shall be lawful for any justice, upon the application of the overseers or guardians of the parish to show cause why any wages then due or which might from time to time become due from the Measham Collieries, Ld., to Harry Summers, a poor person chargeable to the Union of Ashby-de-la-Zouch, should not be paid over in whole or in part to the appellants as such guardians in discharge of the sum of 5*l.* 0*s.* 6*d.*, being the cost price of relief given by way of loan to Harry Summers, for food and necessaries by orders upon tradesmen, by the appellants in virtue of the Poor Law Amendment Act, 1834, s. 58 (1), and the Rules, Orders and Regulations of the Ministry of Health. (2)

At the hearing of the case the following facts were proved or admitted:—

The respondent, Harry Summers, was a miner residing at Measham in the county of Leicester who was in the employ of the Measham Collieries, Ld. At all material times the members of the Leicestershire Miners' Association and the members of the Leicestershire Coal Owners' Association were taking part in a strike. On various dates between June 5, 1926, and October 16, 1926, the respondent Summers obtained from the appellants relief on loan to obtain food and necessaries by orders upon tradesmen for varying amounts, making in all the sum of 5*l.* 3*s.* 6*d.*

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or union providing such relief, and upon proof of the same having been given to or on account of any such person . . . . and of the same, or any part thereof, still remaining due, to issue a summons, requiring such person, as well as the master or employer of such person, or some person on his behalf, to appear before any two justices, at a time and place to be named in such summons, to show cause why any wages due, or which may from time to time become due, from such master or employer, should not be paid over, in whole or in part, to such overseers or guardians. . . . ." The section then provides for the making of orders on the employer to pay over the whole or part of the employee's wages to the overseers or guardians, and also for proceedings for the recovery of any amount ordered to be paid from an employer neglecting or refusing to pay it.

(1) See note (1) ante, p. 397.

(2) Relief Regulation Order No. 1295 (December 28) of 1911, Article XIII., provides: "No relief which may be contrary to the Regulations contained in this Order shall be given by way of loan: but any relief which may be given to, or on account of, any person under the age of 21, or to his wife, or any member of his family under the age of 16, in accordance with those Regulations, may, if the guardians think fit, be given by way of loan."

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The respondent Summers repaid to the appellants the sum of 3*s*. by three 1*s*. instalments on May 30, 1927, July 5, 1927, and July 9, 1927, leaving a balance of 5*l*. 0*s*. 6*d*. due from him.

On each occasion upon which any sum was handed to the respondent Summers he signed a document to the effect that the same was accepted on loan. On February 10, 1927, the appellants made application in writing for repayment of the loan and afterwards their collector, one Moore, made frequent calls upon the respondent Summers, but was not successful in obtaining any further sum. On June 4, 1927, a resolution was passed by the appellants instructing their relieving officer to commence proceedings in respect of the repayment of the said loan. Upon application being made to the justices on August 6, 1927, for summonses against the respondents, such application was duly granted, and on August 6, 1927, summonses were issued.

Upon the hearing of the summonses on August 20, 1927, the justices dismissed the same upon the ground that they had no jurisdiction to deal with the case inasmuch as the proceedings were not commenced within six months from the date upon which the last instalment of the loan was advanced. (1)

[The following cases were referred to by the appellants: *Labalmondiere* v. *Addison* (2); *Grece* v. *Hunt* (3);' and *Harpin* v. *Sykes*. (4)]

At the request of the appellants the justices stated this case for the opinion of the Court, the question being whether on the above facts they came to a right decision in law.

Maurice Healy for the appellants. This is not strictly a matter of complaint and consequently does not fall within the Summary Jurisdiction Act, 1848, s. 11.

In *In re Dillon* (5) Hayes J. said: "The term 'information' means the initiatory step in proceedings of a criminal nature, which are to be disposed of summarily, while the term 'complaint' designates the initiatory step in summary proceedings of a civil nature; but equally in both cases there is contemplated the existence of a matter in controversy between the parties." There is no controversy here as to the existence of the loan. The function of the justices would have been ministerial only—namely, to order the man's employer to pay any wages due to him to the present appellants. The loan itself was admitted. This procedure is authorized by the Poor Law Amendment Act, 1834, s. 59, where a loan has been made to a poor person under s. 58. The justices have jurisdiction to hear and determine this question although six months have expired since the debt was contracted. *Reg.* v. *Edwards* (1) is an analogous case.

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(1) Summary Jurisdiction Act, 1848, s. 11. See headnote.

(2) (1858) 28 L. J. (M. C.) 25; 22 J. P. 767.

(3) (1877) 2 Q. B. D. 389.

(4) (1885) 49 J. P. 148.

(5) (1859) 11 Ir. C. L. Rep. 232, 238.

[LORD HEWART C.J. referred to the judgment of Wills J. in *East London Waterworks Co.* v. *Charles.* (2)]

Even if the limitation period of six months in the Summary Jurisdiction Act, 1848, s. 11, applies, these proceedings are in time. For time begins to run not from the date when the relief was given, but from the time when demand is made for payment and is refused: *Labalmondiere* v. *Addison.* (3) That demand was made, in the present case, on February 10, 1927, and proceedings were commenced on August 6, 1927. A statutory debt differs in this respect from a debt at common law where the demand for payment is not a condition precedent to the right to sue.

D. F. Brundrit for the Measham Colleries, Ld., respondents. We rely on *In re Dillon* (4) as showing that the proceedings here amount to a "complaint" under the Summary Jurisdiction Act, 1848, s. 11. The proceedings must be brought within six months after the matter of complaint arose. Upon the second point, the six months period runs from the date when the relief was granted and not from the time when the repayment was demanded.

[He cited *Morant* v. *Taylor* (5); *Poole and Forden Highway*

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(1) (1884) 13 Q. B. D. 586.

(2) [1894] 2 Q. B. 730.

(3) 28 L. J. (M. C.) 25.

(4) 11 Ir. C. L. Rep. 232, 238.

(5) (1876) 1 Ex. D. 188.

Board v. *Gunning* (1); *Corbett* v. *Badger* (2); and *Mackie* v. *Fox.* (3)]

The respondent Summers was not represented by counsel.

No reply was called for.

LORD HEWART C.J. In this case the appellants laid before a court of summary jurisdiction a claim which they deliberately described as an "application and information" to the effect that wages due from the respondents, the Measham Colliery, Ld., to the respondent Summers should be paid to the appellants in discharge of relief given to Summers by way of loan under the Poor Law Amendment Act, 1834, s. 59, on various dates between June and October, 1926.

The question is whether on the facts of this case the justices were right in holding that they had no jurisdiction to hear the summons, on the ground that the proceedings were out of time under the Summary Jurisdiction Act, 1848, s. 11.

That question involves two points, (1.) whether this application was a "complaint" within the Summary Jurisdiction Acts, and (2.) if it was a complaint, whether or no the proceedings were taken within the period allowed by the Summary Jurisdiction Act, 1848, s. 11. [His Lordship referred to the facts in the case stated and continued:] The appellants applied in writing for the repayment of the loan on February 10, 1927, that is to say, before the earliest date on which any repayment was made. On June 4, 1927, a resolution was passed by the appellants instructing the relieving officer to commence proceedings. On August 6, 1927, the summons was issued upon the application of the relieving officer. If this period of six months applies and if the time runs, as the form of the application suggests, from the day on which the last advance was made, then the time had expired. But if it runs from February 10, 1927, when the demand in writing was made, then the application was in time. [His Lordship read the Summary Jurisdiction Act, 1848, s. 11, and continued:] Upon the first point, I am of opinion that the application can properly be described as a complaint for the reasons given in *In re Dillon*. (1)

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(1) (1882) 51 L. J. (M. C.) 49. (2) [1901] 2 K. B. 278.
(3) (1911) 75 J. P. 470.

In *East London Waterworks* v. *Charles* (2) Wills J. said: "Unless there is some insuperable difficulty in reading the word 'complaint' as applying to such proceedings as this, I think it ought to be applied. There might have been considerable difficulty before the Summary Jurisdiction Act, but I cannot see any difficulty now since the two Acts are to be read together. In the present case, the water company stated before the magistrate that the sum in question is due, and that it has not been paid. That is exactly what a plaint in the county court or a statement of claim in the High Court does."

A person seeking to recover money under the Summary Jurisdiction Act, 1848, is a person making a complaint, just as a person seeking to recover money in the civil courts is a plaintiff, and in the county court begins proceedings by a document called a "plaint." The proceedings therefore must begin within six months from the time when the matter of the complaint arose.

As to the point when the matter of this complaint arose, the Poor Law Amendment Act, 1834, s. 58, provides that such relief as the Poor Law Commissioners may direct shall be given by way of loan. The direction in the present case is to be found in art. 13 of the Relief Regulation Order, 1911 (Statutory Rules and Orders, 1911, No. 1295). This particular relief was so given, and for each instalment the respondent Summers gave a receipt. When was the loan to be repaid? Ex hypothesi, these loans were made in instalments to impoverished persons because they were impoverished, and because otherwise the borrowers could not provide themselves or their dependents with necessaries of life. No mention is made in the statute as to the time for repayment. Provision is made in s. 59 of the Poor Law Amendment Act, 1834, as to a collateral matter—namely, as

(1) 11 Ir. C. L. Rep. 232. (2) [1894] 2 Q. B. 730, 734.

to the power of the justices to attach wages in the hands of the borrower's employers. Application may be made by the overseers to the justices, and upon proof of the relief having been given and of payment still remaining due a summons may be issued. Unless cause is shown to the contrary, the justices may then order payment of the employee's wages to the overseers or guardians, and proceedings may be taken for the recovery of the amount if the employer neglects or refuses to pay it.

That section assumes that if and when this machinery is turned to account there is money due and unpaid, but it throws no light on the question when it becomes due and begins to be unpaid. It would be repugnant to reason to hold that because the Act of 1834 is silent on the question when the loan is repayable, it is repayable instantly, that is, to hold that the poor person in receipt of relief whether in money or in kind is instantly liable to repay each instalment as soon as he receives it. I cannot follow the argument that it was due at the date of the payment of the last instalment. The real contest seems to me to be whether the loan was repayable immediately or after the full amount was ascertained and demand made. Some light is thrown upon the question by *Labalmondiere* v. *Addison* (1), although that was a decision under a different statute, the Metropolitan Building Act, 1855, which authorizes the Commissioners under that Act in certain events to charge the owners with the costs of taking down, repairing, or securing dangerous structures. No time of complaint is limited by the Act. It was held that the six months referred to in the Summary Jurisdiction Act, 1848, s. 11, were to be reckoned from the demand and refusal and not from the time when the expense was incurred. Lord Campbell C.J. said in his judgment in that case: "It would be contrary to all reason to hold that liability to the summons or default existed before application for payment. It is true that a demand is not expressly required, but I think that until then the liability does not accrue." When the material sections of the Metropolitan

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(1) 28 L. J. (M. C.) 25.

Building Act, 1855, are compared with the Poor Law Amendment Act, 1834, s. 58, which deals with relief to necessitous persons, the language there used is applicable a fortiori to the present case. Although there is no express provision as to a demand being made for the repayment of the loan, there can be no liability until demand is made.

It follows that although the application here is a "complaint" within the Summary Jurisdiction Act, 1848, s. 11, to which the period of six months applies, the proceedings are in time. The complaint was not lodged until August, 1927, but that was within six months from the date when demand was made for payment. For these reasons it appears to me that the justices have misdirected themselves and that this appeal should be allowed.

SALTER J. I agree. The complaint here arose for the purpose of the Summary Jurisdiction Act, 1848, s. 11, as soon as the complainant had a good cause of action, that is to say, when he could first show a legal right to the remedy claimed.

As regards the Poor Law Amendment Act, 1834, s. 59, it seems to me that a doubt might occur in other cases whether the matter of complaint could be said to arise until the impoverished person, to whom relief has been given by the guardians, has succeeded in finding employment and so has an actual master or employer. But it is not necessary to consider the point, because here the man had an employer, when the demand was made. The appeal must be allowed.

ROCHE J. Upon the first question I think that an application under the Poor Law Amendment Act, 1834, s. 59, is a complaint. As to the second, the application must be made by summons, at the hearing of which the master or employer is required to appear. It seems to me therefore that the matter of complaint under that section (s. 59) cannot arise until there is a master or employer in existence. But it is unnecessary for the decision of the present case to express a concluded opinion on that point. It is sufficient for the purposes of the present case to say that by necessary implication from the section the matter of complaint does not arise until a demand has been made for repayment of the loan, and that demand is not satisfied.

Appeal allowed.

Solicitors for appellants: *Andrew, Wood, Purves & Sutton, for Fishers, Ashby-de-la-Zouch.*

Solicitors for respondent: *Corbin, Greener & Cook.*

F. P. F.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1927
Nov. 23.
C. A.
1928
March 26.

MALLETT (INSPECTOR OF TAXES) *v.* STAVELEY COAL AND IRON COMPANY, LIMITED.

Revenue—Income Tax—Trade Profits—Deductions—Colliery Company—Sum paid for Surrender of Mining Lease—Capital or Income Expenditure—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. A, No. III.*; *Sch. D, Rules applicable to Cases I. and II.*, *r.* 3.

Payments made by a colliery company to its lessor in consideration of his accepting the surrender of one mining lease and of a part of the area demised by another mining lease and releasing the company from its obligations under the first lease and its obligations in respect of the area surrendered under the second lease are sums paid in respect of the company's fixed capital and not payments made for the purposes of its trade of winning and selling coal. They were therefore not admissible deductions in estimating the profits of the company for income tax purposes.

Test laid down by Lord Sumner in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* [1915] A. C. 433, 468 and approved by Viscount Cave in *British Insulated and Helsby Cables, Ld.* v. *Atherton* [1926] A. C. 205, 212, 213 applied.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of Scarsdale in the county of Derby under s. 149 of the Income Tax Act, 1918, for the opinion of the High Court of Justice.

At a meeting of the above Commissioners held on May 5, 1926, for the purpose of hearing appeals, the Staveley Coal

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and Iron Company, Ld. (hereinafter called "the company"), whose registered office was situate at Staveley near Chester, appealed against an assessment to income tax in the sum of 590,000*l.* less 90,000*l.* wear and tear for the year ended April 5, 1925, made upon the company under No. III. of Sch. A of the Income Tax Act, 1918, in respect of their profits as colliery proprietors, etc.

In the computation of this assessment two sums amounting in all to 6500*l.* paid by the company in the circumstances hereinafter set forth were not allowed as a deduction from profits, and it was only in respect of those two sums that the opinion of the Court was sought. There was no dispute as to figures.

The following facts were admitted or proved:—

By a mining lease (hereinafter referred to as "the lease of 1882") dated November 10, 1882, William Arkwright and others demised to the company the top hard and all other beds of workable coal in and near Sutton-cum-Duckmanton, Derbyshire (including the 384 acres hereinafter referred to), for sixty-three years from March 25, 1882, with the right to work, get and dispose of such coal. A minimum rent and mining royalties were reserved and made payable and the company covenanted that they would at all times during the term work and develop the demised mines in a proper, careful and skilful manner, and according to the most approved practice and method of working and developing similar mines in Derbyshire and so as to work and raise the largest possible quantity of coal without causing any damage or injury to the demised seams of coal. The company also covenanted that they would not at any time do or suffer within the demised or associated mines any wilful or negligent act whereby the mines might be damaged by or be overcharged with water or foul air or otherwise injured or whereby the workings of any such mines might be impeded or prevented. The lease did not empower the company to surrender any part or parts of the demised mines as distinguished [from the entirety of the hereditaments demised.

Certain supplemental deeds were subsequently executed dated respectively May 2, 1899, October 29, 1909, December 1, 1910, February 25, 1916, December 30, 1917, May 31, 1920, and May 31, 1922. These deeds had reference to wayleaves and barriers and no point turned upon them in connection with the present appeal.

By an indenture dated March 3, 1923, to which William Arkwright and the company were parties, the lease of 1882 as varied by the above mentioned supplemental deeds was further modified, and in consideration of 3500*l.* paid by the company to Arkwright's trustees the company surrendered all the seams of coal under specified lands containing 384 acres in Sutton-cum-Duckmanton (being part of the area comprised in the lease of 1882) to the intent that the residue of the term of years created by the lease of 1882 and all other the estate interest and rights of the company thereunder might as to the surrendered hereditaments merge and be extinguished in the reversion which was expectant thereon. By the same deed Arkwright released the company from all actions, proceedings, claims and demands for or in relation to all rents, royalties, payments, damages, compensation, covenants, agreements and liabilities under the lease of 1882 so far as concerned the surrendered premises.

By a mining lease (hereinafter referred to as "the lease of 1919") dated June 24, 1919, William Arkwright demised to the company the top hard and other seams of workable coal under specified lands in Temple Normanton, Derbyshire, for twenty-one years from June 24, 1919, subject to a minimum rent and to mining royalties. The lessees' obligations under this lease were substantially similar to those above referred to as being contained in the lease of 1882. The lease of 1919 did not empower the company to surrender the whole or any part of the seams of coal demised by it.

By another indenture dated March 3, 1923, in consideration of 3000*l.* paid by the company to Arkwright the company surrendered to him all and singular the premises comprised in and demised by the lease of 1919 to the intent that the residue of the term of twenty-one years thereby created and all other the estate, interest and rights of the company thereunder might merge and be extinguished in the reversion which was expectant thereon. The payment of this 3000*l.* absolved the company (inter alia) from the obligation contained in the lease of 1919 to restore the surface of the surrendered premises.

The sum of 6500*l.* already referred to was made up of the two sums of 3000*l.* and 3500*l.* above mentioned.

On behalf of the company it was contended that: (i.) The deduction was not prohibited by r. 5 of No. III. of Sch. A, seeing that here the 6500*l.* was not paid as nor out of or in respect of any " annual " profit or value but paid once for all for getting rid of an unprofitable subject-matter and that the company were not in possession of the surrendered hereditaments during the year of assessment; (ii.) The deduction was not prohibited by r. 3 of the Rules applicable to Cases I. and II. of Sch. D, but, on the contrary, was allowed by such rule, the 6500*l.* being " money wholly and exclusively laid out or expended for the purpose of the trade," and a " loss connected with or arising out of the trade " ; (iii.) The 6500*l.* was rightly deductible as being expenditure incidental to the trade and necessary to earn profits by applying in the computation the ordinary principles of commercial trading; (iv.) The 6500*l.* was not an expenditure of capital in that no tangible asset was received in respect of it and that it could not be rightly added to capital account in any balance sheet; and (v.) The money was paid by way of commutation of periodical outgoings for obviating a continuous business demand and for getting rid of onerous liabilities under the leases.

On behalf of the Crown it was contended (inter alia) that: (i.) The payments amounting to 6500*l.* were capital payments; (ii.) By s. 209 of the Income Tax Act, 1918, all deductions except those expressly allowed were inadmissible and there was no provision of the said Act allowing such deductions; (iii.) The expenditure was not incurred for the purpose of earning profits; (iv.) These payments were payments to the owner of the soil or property within r. 5 of No. III. of Sch. A of the Act of 1918, and were therefore inadmissible deductions; (v.) These payments represented a commutation of annual payments under the same rule and that since the allowance of an annual payment itself was prohibited by the rule a lump sum payment in commutation of an annual payment could not be allowed; (vi.) The said payments were not proper items of expenditure to be debited against the profits for the income tax year 1924–25.

The Commissioners decided that these sums aggregating 6500*l.* should be allowed as an admissible deduction for income tax purposes in computing the company's profits.

The Inspector of Taxes appealed, and required the Commissioners to state a case for the opinion of the High Court.

The question stated by the case was whether these sums aggregating 6500*l.* were to be allowed as deductions in computing the profits of the company for income tax purposes.

The appeal was heard before Rowlatt J. on November 23, 1927.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the appellant.

Latter K.C. and *H. V. Rabagliati* for the respondents.

Rowlatt J. This is an important case and perhaps may be more important having regard to the state of the coal trade than otherwise it would have been, but I do not think it is a difficult case.

This colliery company had a certain acreage under lease, and in two cases they have surrendered some of their acreage and had to pay to get the reversioner to accept the surrender. I suppose they did it because they did not see their way to work it at a profit; perhaps they thought it would be a great loss; at any rate they got rid of it in the way I have mentioned. The question is whether they can deduct the sum paid by them for the surrender from their profits for income tax purposes. It is abundantly clear that when a colliery company acquires a lease the expense of so acquiring it is the expense of acquiring a capital asset and is a capital expenditure, and it has been frequently remarked that it is very hard that there is no provision in the Act for allowing

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the company to establish a sinking fund or something of that kind to enable them to replace that capital expenditure. But there it is; it is a capital expenditure. If the company sell the lease that they have or part of it at an advantage, I cannot but think that what they receive would be a receipt on account of capital. Here what they have done is to get rid of a part of the area which they thought would be unremunerative, and they thought it well to pay for so doing. In my judgment, all receipts and payments in connection with acquiring and disposing of leases of minerals to be worked by collieries in this way are capital transactions for this purpose. I cannot see any other way of looking at it. The company have got nothing, says Mr. Latter, for this expenditure. Perhaps that may be so, but they have got this: they have got a field of minerals which has the advantage of being no longer encumbered with an undesirable part. It seems to me that the whole transaction on the clearest possible principles is a capital transaction.

But then the case was put another way. Cases were referred to in which payments have been made, principally to servants or members of a staff, by way of redemption of an annual business expenditure by a payment in one particular year instead of making payments over a number of years, and in which it has been held that where that has been done the sum so paid can be deducted. But those decisions only apply, of course, where the annual business expense, which is redeemed by the single payment, is an annual business expense chargeable against revenue. Here that is not the case at all. The company do not make these payments in order to rid themselves of any annual charge against revenue in the future. They make them in order to get rid of the loss or apprehended loss in the business—an entirely different matter—after the income and the expenditure have been put together. In other words, they are paying this money in order pro tanto to go out of the business. They are not meeting in advance an annual demand in the business.

Therefore, it seems to me, that those cases have nothing whatever to do with the present case. I think myself, that although this is an important case, it is a very clear one, and that judgment must be for the Crown and the appeal allowed with costs.

The company appealed. The appeal was heard on March 26, 1928.

Latter K.C. and *H. V. Rabagliati* for the appellants.

Sir Thomas Inskip S.-G. and *R. P. Hills* for the Crown.

[The following cases were referred to: *Hancock* v. *General Reversionary and Investment Co.* (1); *British Insulated and Helsby Cables, Ld.* v. *Atherton* (2); *Farmer* v. *Scottish North American Trust, Ld.* (3); *Countess Warwick Steamship Co.* v. *Ogg* (4); *John Smith & Son* v. *Moore* (5); *Wigan Coal and Iron Co.* v. *Eckersley* (6); *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (7); *Coltness Iron Co.* v. *Black* (8); *MacTaggart* v. *B. & E. Strump* (9); *Robert Addie & Sons' Collieries, Ld.* v. *Inland Revenue Commissioners* (10); *Glenboig Union Fireclay Co.* v. *Inland Revenue* (11); *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (12); *Rowntree & Co.* v. *Curtis* (13); *Southwell* v. *Savill Bros., Ld.* (14); *Vallambrosa Rubber Co.* v. *Farmer* (15); *In re Hunloke's Settled Estates* (16); *Jefferys* v. *Fairs.* (17)]

LORD HANWORTH M.R. This case is at first sight a difficult one. It is difficult because of the facts which are not easy to measure. It is not easy, too, because the Commissioners have adopted one view and Rowlatt J. has set aside that view without hesitation, finding the case quite a plain one, on the other side of the line.

The case arises in this way. The Staveley Coal and Iron Company claim to deduct two items amounting together to 6500*l.*, as being sums which they ought to be allowed as a

(1) [1919] 1 K. B. 25.
(2) [1926] A. C. 205.
(3) [1912] A. C. 118.
(4) [1924] 2 K. B. 292.
(5) [1921] 2 A. C. 13.
(6) (1910) 103 L. T. 468.
(7) [1915] A. C. 433.
(8) (1881) 6 App. Cas. 315.
(9) (1925) 10 Tax Cas. 17.
(10) (1924) 8 Tax Cas. 671.
(11) 1922 S. C. (H. L.) 112.
(12) [1914] 3 K. B. 674.
(13) [1925] 1 K. B. 328.
(14) (1901) 4 Tax Cas. 430.
(15) (1910) 5 Tax Cas. 529.
(16) [1902] 1 Ch. 941.
(17) (1876) 4 Ch. D. 448.

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deduction from their profits. We all know that income tax is imposed upon the subject under different schedules, according as the matter in relation to which he is taxed falls under one schedule or under another. The company carry on the business of winning and getting coal, and they fall to be taxed under a particular rule of Sch. A, which introduces in a certain measure the standard of a Case of Sch. D in respect of their profits or gains. Under r. 3 of the Rules applicable to Cases I. and II. of Sch. D, it is declared that "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation," and "(*f*) Any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade, profession, employment, or vocation," and there are others. The inwardness of that rule has been many times pointed out. But I think it is now accepted that the declaration in the speech of Lord Sumner in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1) is the true reading of that rule. He said: "The effect of this structure, I think, is this, that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it." There have been a number of cases which have been decided upon the question what is a proper deduction, and we have been referred to some of them which give useful and helpful illustrations on one side of the line and on the other. It has been said that if you go to the profit and loss account and the balance sheet, the test to apply to ascertain whether or not a deduction is a proper one is to ask the question: Do you acquire an

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(1) [1915] A. C. 433, 468.

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asset by the expenditure which you have made? If you do, then that asset is something which is acquired by an expenditure out of capital. If you do not acquire an asset, then the expenditure may be something which is a debit in the profit and loss account. It has been said that you may look to see whether or not you are dealing with a recurrent item, an item which would appear year by year in the profit and loss account, and if you are dealing with such an item, then even though you are making an out-and-out expenditure to redeem it, you are still dealing with something which belongs to the profit and loss account. For my part, I do not believe that those tests, although they may be of some help in certain cases, are either fundamental, exact, or accurate. I think one has to keep clear in one's mind that in dealing with any business there are two kinds of capital, one the fixed capital which is laid out in the fixed plant, whereby the opportunity of making profits or gains is secured, and the other the circulating capital, which is turned over and over in the course of the business which is carried on. The basis of what I have said may, I think, be found in what was said by Lord Haldane in *John Smith & Son* v. *Moore.* (1) That was a case in which a man had succeeded to a business which had obtained valuable contracts under which coal was to be supplied at a very advantageous price, and what I may call the capital value of those contracts was 30,000*l.* The case was decided in reference to excess profits duty, and therefore somewhat different considerations apply. But the observations which are made by Lord Haldane are, I think, germane to the present case. He said (2): "My Lords, in the case before us the appellant, of course, made profit with circulating capital by buying coal under the contracts he had acquired from his father's estate at the stipulated price of fourteen shillings and re-selling it for more, but he was able to do this simply because he had acquired, among other assets of his business, including the goodwill, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting with them to other masters, but by retaining

(1) [1921] 2 A. C. 13.

(2) [1921] 2 A. C. 20.

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them, that he was able to employ his circulating capital in buying under them." If, again, one wants another illustration of the difference between the fixed capital and the circulating capital—the difference between the items that fall to be dealt with as capital in the balance sheet and the items which fall into the profit and loss account—one may go back to the old case of *City of London Contract Corporation* v. *Styles* (1), a case which we all remember by reason of the pleasantries of the late Lord Esher in reference to some of the counsel who appeared in the case before him. But there it was attempted to deduct a sum of 180,000*l.*, which was part of the price of the business which was carried on. The business was one which had been purchased and was therefore in the nature of a wasting asset, and Lord Esher said (2): "Now nothing can be more plain, if that be so, than that 180,000*l.* was the capital which they embarked in that business, the money they paid for it. If that was the capital which they embarked in that business, they then proceeded to carry on the business. How can you carry on a business after you have embarked your capital in the purchase of it? You must find new money in order to pay the expenses year by year, but then you do find money to pay the expenses year by year, and you get the receipts year by year, and the difference between the expenses necessary to earn the receipts of the year, and the receipts of the year are the profits of the business for the purpose of the income tax." Then Fry L.J. said (3): "It appears to me that this 180,000*l.* was a sum 'employed or intended to be employed' as capital in the trade of the company, therefore it is a sum from which no deduction can be made under the Income Tax Acts." Those are the two illustrations which I think keep quite clearly before one the fact that one must separate the sum employed in the purchase of the business from the sum employed in carrying it on—namely, the circulating capital.

In *British Insulated and Helsby Cables* v. *Atherton* (4) Viscount Cave deals with these cases. He accepts the rule

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(1) (1887) 2 Tax Cas. 239.
(2) Ibid. 243, 244.
(3) (1887) 2 Tax Cas. 245.
(4) [1926] A. C. 205.

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laid down by Lord Sumner as to what are proper deductions, and I think he adds that you have to consider the matter from the point of view of commercial expediency. Reliance is placed on the passage where he says (1): "But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital," and he gives illustrations of that sort derived from a number of decided cases.

I come, therefore, to the facts of the present case. It must be remembered that the company are concerned in deriving their profits from the sale of coal. Their business is not one of handling properties or buying and selling or dealing with properties or concessions. We have known such companies, not in this country but abroad, which have been concerned in the handling of concessions and the buying and selling of properties with advantage to themselves. But here we have the case of a company which are engaged in mining. How do they acquire the mine in which they are to seek their profits? They have either to buy properties or to obtain leases of them, and those leases may impose upon them either the burden of an immediate payment, or the burden of winning and getting the coal, the maintenance of the mine, the keeping of it free from water and from bad air, and the like, all of which may enure to the benefit of the landlord or owner of the mine, while the company themselves acquire the coal and are able to sell it in the market at, it is hoped, a profit. But throughout one has to remember that the business of this company was the business of winning and then selling the coal which they got in the places and from the places where they had a right to work, by reason of the leases which they held. Like many other companies, they had a number of leases, and, if I remember rightly, they had had, contiguous to the areas comprised in the leases, some

(1) [1926] A. C. 213.

actual freehold property of their own. In other words, they had rights to work in these mines under varying systems of holdings. We are told by the case what the facts are. One lease, dated November 10, 1882, was a lease whereby William Arkwright demised to the company certain veins and beds of workable coal. There was to be a minimum rent paid, mining royalties were reserved, and the company were to work the mine so as to raise the largest possible quantity of coal without causing any damage or injury to the demised seams of coal. This lease did not empower the company to surrender any part or parts of the demised mines as distinguished from the entirety of the hereditaments demised. The lease was to expire in 1945. The company also had to pay a dead rent under the lease. On March 3, 1923, they entered into an indenture, which is referred to in para. 3 (*c*) of the case. By the terms of that indenture the company surrendered all the seams of coal under certain specified lands containing 384 acres, to the intent that the residue of the term of years created by the lease of 1882 and all other the estate interest and rights of the company thereunder might, as to the surrendered hereditaments, merge and be extinguished in the reversion, and for that right so to give up all responsibility in respect of the 384 acres they paid to Mr. Arkwright 3500*l.* I pause there for a moment. Was that sum incurred in respect of the coal that was gotten or being gotten, or was it in relation to a capital item which would appear in the balance sheet, namely, this lease, and did it relieve the company from a continuing liability in respect of the capital item—namely, their right to acquire the coal as distinguished from the actual coal gotten, which was the business which they carried on?

In the next case there was a mining lease dated June 24, 1919, which would expire in 1940. In 1923, it appears that the company were minded to be released entirely from their liability under that lease. Whether the coal had proved unprofitable, whether it had been worked out or not, I do not know. But the result of the indenture of March 3, 1923, was that the company were freed entirely from any responsibility in respect of the lease of the coal which had been granted by the lease of June 24, 1919, in consideration of the payment to Arkwright of the sum of 3000*l.* Again, was that 3000*l.* paid in relation to the coal gotten or to be gotten or was it in relation to the right to get coal which was given to them under the original lease of 1919?

Those two sums of 3500*l.* and 3000*l.* having been so paid, one asks oneself: Can it be said that they were paid in respect of the earning of profits or gains? Can it be said that they were sums paid in respect of the circulating capital, or that they were items which were paid in respect of the original capital outlay, or what may be called the fixed capital, by which the right to win coal was secured to the company? It appears to me that the answer to that is this, that the company disposed of a liability. They were able to get rid—in the second case, perhaps even more effectively than in the first—of a liability which would have hung round their necks. By this payment out-and-out they freed themselves from what was a capital liability.

The way in which I think the case can be put on behalf of the company and in which the difficulty arises, is that if the two indentures of March 3, 1923, had not been entered into, and if the company had year by year gone on pumping or keeping up the timbering and so on under the 384 acres in the first case, and if they had gone on pumping and keeping the ventilation going in the area granted to them under the mining lease of June 24, 1919, the expenses thereby incurred might legitimately have been charged by them in their profit and loss account as an item which belonged to, and was rightly to be treated as, an annual recurrent expense. That is quite true. But I do not think the recurrence of the expense enables one to test what is the true nature of the outlay when the sum is paid for relief from that recurrent expense. It appears to me that one must apply the original test that I applied and see whether or not the outlay is one in respect of the fixed capital or one in respect of the circulating capital which is employed in the mine.

Rowlatt J. has, I think, employed that test quite correctly in the latter part of his judgment, where he says: "But those decisions only apply, of course, where the annual business expense, which is redeemed by the single payment, is an annual business expense chargeable against revenue. Here that is not the case at all. The company do not make these payments in order to rid themselves of an annual charge against revenue in the future. They make them in order to get rid of the loss or apprehended loss in the business—an entirely different matter—after the income and the expenditure have been put together. In other words, they are paying this money in order pro tanto to go out of the business."

The cases upon which Mr. Latter can legitimately rely most strongly are *Hancock's* case (1) and *Smith's* case. (2) Those were two cases in which the item dealt with was a matter of revenue, a matter of ordinary working entirely. There could not have been a capital outlay in respect of the pension to the pensioner in the first case or in respect of the gratuity to the reporter in the second case. Both of those matters were incidental to the carrying on of the business. Here, to my mind, the case is quite different, and I think the principle which was laid down, and which is to be found in *Atherton's* case (3), shows that the distinction to be drawn between the activities of the circulating capital and the purpose of the fixed capital must always be borne in mind, and it appears to me upon the facts in this case, when one has closely examined them, that these two sums have been laid out in relation to, and as relevant to, the opportunity for the company to go on, or the duty of the company to go on, working the mine as distinct from and opposed to the actual coal which they would have gotten if they had continued to use that opportunity.

One difficulty, no doubt, is presented by the fact that the Commissioners who heard the appeal have held that this 6500*l*. should be allowed as an admissible deduction for income tax purposes in computing the company's profits. It does not appear to me that the question to be decided by them was one simply of fact. In my opinion, it was at least a question

(1) [1919] 1 K. B. 25. (2) [1914] 3 K. B. 674.
(3) [1926] A. C. 205.

of mixed law and fact—and, I am inclined to think, one of law only—whether or not these sums could be properly attributable to the fixed or to the circulating capital. The case is undoubtedly a difficult one, because one has to appreciate very exactly what the purpose was for which the payment was made. In my judgment the Commissioners have come to a wrong conclusion, because there was no evidence before them upon which they could come to the conclusion they did. It was not a question of accountancy; it was a matter upon which, when the true nature of the payment was ascertained, they ought to have found that it was a payment in respect of a capital item and not in respect of the profit and loss account. I feel, therefore, able to say that Rowlatt J. was entitled to set aside the decision of the Commissioners, and that the grounds upon which he did so appeal to me as being right. The appeal therefore must be dismissed with costs.

Sargant L.J. I am of the same opinion. In the first case, which is the case of the payment of 3500*l.*, the facts appear to me to be these, that the company had in existence and as part of their capital assets this large mining lease, which, at the time in question had a period of, I think, twenty-two years unexpired, and they entered into an arrangement which had the effect, in my judgment, of modifying in important respects the conditions of that lease. By that modification the area subject to the lease was diminished, though the payments to be made in respect of dead rent were kept at the same figure. Generally speaking the deed of surrender was a deed which contracted the area leased to the company and operated by way of modification of the capital asset with which they were conducting their business.

In the second case, the case of the payment of 3000*l.*, the position was this, that the company obviously considered that the lease was an onerous asset and accordingly they made a payment for the purpose of getting rid of and extinguishing an asset which undoubtedly formed part of their permanent capital in their business, and they paid a lump sum for the purpose of ridding themselves of that, which, instead of being an advantage, as they had hoped, had turned out to be a disadvantage.

It is accepted on both sides that the principle to be applied is that stated by Lord Sumner in *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (1), and we have to consider whether the payment was, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of the profits of the trade. Mr. Latter, while accepting that as the proper test, rather urged that it had, in some way, been limited by the observations of the Lord Chancellor in *British Insulated and Helsby Cables, Ld.* v. *Atherton* (2), in that passage which my Lord has read, and which contains the phrase " when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade." Mr. Latter suggested that that had the effect of limiting the general principle enunciated by Lord Sumner to the case where there was a payment in respect of the acquisition of a positive asset, and that it did not apply to a case where the payment was made for the purpose of getting rid of an onerous asset. It seems to me that that phrase, " bringing into existence an asset or an advantage for the enduring benefit of the trade," was one which was applicable to the facts of the case before the Lord Chancellor, but in no way implied that Lord Sumner's principle was to be limited to such a case, and I have already said, in language corresponding with that used by the Lord Chancellor, what appears to me to be the case with regard to these two items.

In the second case, the case of the item of 5000*l.*, the payment was being made for the purpose of putting an end to the existence of a disadvantage or onerous asset, for the enduring benefit of the trade. To my mind such a transaction is entirely within the principle of the words of the Lord Chancellor as used with regard to the acquisition of a positive asset. In the case of the 3500*l.* it seems to me a possibly clearer case than the other case. It is a payment made for the purpose

(1) [1915] A. C. 433, 468.

(2) [1926] A. C. 205, 213.

of modifying the conditions of an existing asset so as to make the resultant term more advantageous or less disadvantageous for the enduring benefit of the trade. In that case it seems to me that the words of the Lord Chancellor, in themselves applicable to the acquisition of a positive asset or possible advantage, are equally applicable to the case where the payment is made for the purpose of getting rid of a permanent disadvantage or onerous liability arising with regard to the lease, which was a permanent asset of the business. In my judgment the decision of the learned judge was correct and should be affirmed.

LAWRENCE L.J. I agree. The question in this case is whether two sums of money, amounting together to 6500*l.*, paid by the company to its lessors in consideration of the latter accepting a surrender of certain seams of coal, comprised in the two leases of 1882 and 1919, are admissible deductions for income tax purposes in computing profits for the year ending April 5, 1925. In my judgment the true test to be applied in determining this question is that laid down by Lord Sumner in *Usher's* case (1) and approved by Viscount Cave L.C. in *Atherton's* case (2)—namely, Is this sum of 6500*l.* a proper debit item to be charged against incomings from the trade of the company when computing the balance of the profits of such trade ? In applying that test it is essential, in the first place, to see what the trade of the company really is, and, secondly, whether the payment was money wholly and exclusively expended for the purposes of that trade, or was otherwise a proper debit item to be charged against the incomings of that trade.

Now as regards the nature of the trade carried on by the company there is really no dispute. It must be borne in mind that the company's trade does not consist of acquiring and selling or otherwise dealing in mining leases. The company's business is that of colliery proprietors, and its trade consists of the winning and the selling of coal. For the purpose of carrying on that trade it has acquired numerous leases, including the two leases in question. These two leases, to my mind, clearly constitute a part of the fixed capital assets of the company, and none the less so because they were acquired without the payment of any cash premium. It is only necessary to substitute the words "mining leases" for the word "contracts" in the passage in Lord Sumner's speech in *John Smith & Son* v. *Moore* (1), to make that passage directly applicable to the facts of the present case. He there says: "The business carried on was not that of buying and selling contracts, but of buying and selling coals, and the contracts, which enabled the seller of the coals to acquire the coals, were no more the subject of his trading as the stock in trade for sale than a lease of a brickfield would be the subject of a sale of bricks." Now if I have rightly appreciated the nature of the trade carried on by the company, the second question, namely, whether the sum of 6500*l.* is a proper debit item against the incomings of that trade, presents no difficulties.

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(1) [1915] A. C. 433, 468.

(2) [1926] A. C. 205.

The company, for sufficient reasons, decided to get rid of certain seams of coal constituting part of its fixed capital assets. The only practical way of disposing of those seams was to procure the lessor to accept a surrender of the leases under which they were held, and in order to effect such surrender the company had to pay the 6500*l.* in question. In those circumstances it cannot, in my opinion, reasonably be said that the consideration paid for the acceptance of the surrender was a sum wholly and exclusively expended for the purpose of winning and selling the coal in which the company traded. In substance and in fact it was a sum paid for the purpose of getting rid of a capital asset of the company which had become burdensome to the company. In principle, such a payment seems to me to stand on precisely the same footing as a loss or profit sustained or made by a trading company on the disposal of part of its fixed capital. Perhaps it is not very material in this case to define the precise nature of the payment, whether it can properly be said to be a payment made in order to improve the rest of the company's fixed capital assets, or whether it can properly be described as a loss of capital. Whatever may be the accurate description of the payment, it seems clear to me that it is a payment made in respect of the company's fixed capital and not a payment made in respect of its trade of winning and selling coal so as to form a proper debit item against the incomings of that trade.

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(1) [1921] 2 A. C. 13, 38.

Counsel for the company have relied strongly on *Hancock's* case. (1) In my opinion its facts differ essentially from the facts of the present case. In that case it could not reasonably have been suggested that the payment made to the actuary was one made in respect of any fixed capital asset. It was a payment made by way of commutation of a liability which the company had undertaken to make an annual payment to one of its late employees, and, in my opinion, such a payment stands on an entirely different footing from the payment which we have to consider here. The mere fact that the disposal of its seams by surrender to the lessor has operated to free the company from certain expenses which the company would otherwise have had to incur and which could properly have been charged against the incomings of its trade does not, in my judgment, bring this case within the principle of the decision in *Hancock's* case (1) or make the payment of the 6500*l.* an admissible deduction for income tax purposes in computing the company's profits for the period in question.

For these reasons I agree that the decision of Rowlatt J. was right, and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for appellants: *Johnson, Weatherall, Sturt & Hardy, for Parker Rhodes, Cockburn & Co., Rotherham.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

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(1) [1919] 1 K. B. 25.

W. I. C.

1928
Jan. 11, 12, 13, 16, 17, 26

FOREMAN AND ELLAMS, LIMITED *v.* FEDERAL STEAM NAVIGATION COMPANY, LIMITED.

[1927. F. 70.]

Shipping—Bill of Lading—Delivery of Cargo in damaged Condition—Damage due to Default of Servant of the Shipowners in the Management of refrigerating Machinery—" Default . . . . in the management of the ship " —Deviation—Liability of the Shipowners—Sea Carriage of Goods Act, 1924, *Commonwealth of Australia Statutes No.* 22 *of* 1924*—Carriage of Goods by Sea Act,* 1924 (14 *&* 15 *Geo.* 5, *c.* 22), *Schedule, Art. III., r.* 2; *Art. IV., r.* 2, *r.* 4.

By the Schedule to the Sea Carriage of Goods (Australia) Act, 1924, which is in identical terms with the Schedule to the British statute Carriage of Goods by Sea Act, 1924, it is provided as follows in Art. III., r. 2: " Subject to the provisions of Article IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Art. IV., r. 2: " Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(*a*) act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

Frozen meat was shipped on board a steamship at a Queensland port for carriage to Liverpool. It was stated in the bill of lading that the meat was shipped in good order and condition. When the meat was delivered at Liverpool it was badly damaged, owing to the temperature in the insulated holds where the meat was carried having been too high. The vessel had two refrigerating machines which could be worked alternatively or simultaneously. In fact only one was used on the voyage. The judge held that the chief engineer was guilty of an error of judgment in not working the second refrigerating machine until the temperatures in the insulated holds had been reduced low enough. In an action by the bill of lading holders against the carriers for the damage to the meat:—

Held, that the carriers were not protected by the exception in Art. IV., r. 2 (*a*), of the Schedule to the Sea Carriage of Goods Act, 1924, as the words " neglect or default . . . . in the management of the ship " referred to matters directly affecting the ship as a ship, and did not apply to negligent acts in relation to those parts of the ship—such as the refrigerating machinery—which were provided solely for the care of the cargo, and that therefore the carriers were liable under Art. III., r. 2, of the Schedule for the damage.

Held further, that on the facts there was no unreasonable deviation under Art. IV., r. 4, of the Schedule to the Sea Carriage of Goods Act, 1924.

ACTION tried before Wright J. in the Commercial Court.

The plaintiffs, Foreman & Ellams, Ld., claimed damages from the defendants, the Federal Steam Navigation Company, Ld., for breach of contract and/or duty in respect of the carriage of goods by sea.

The plaintiffs were the indorsees of bills of lading under which 697 hind quarters of ox beef were shipped on the defendants' steamer *Rimutaka* on November 24, 1925, at Gladstone in Queensland, Australia, for carriage to Liverpool. The beef was described in the bill of lading as shipped in apparent good order and condition and as being hard frozen.

The bill of lading contained the following clauses:—

" . . . . with liberty either before or after proceeding towards the port of discharge to proceed to and stay at and/or return to any ports or places whatsoever (although in a contrary direction to or out of the route to or beyond the said port of discharge) once or oftener, in any order, backwards or forwards, for the purpose of dry docking (even with cargo on board) or loading or discharging cargo, coal or passengers, or for any purpose whatsoever. . . . . All the said liberties, exceptions, and conditions shall apply (any warranty, implied term, custom, or rule of law to the contrary notwithstanding), although the vessel may have deviated from the contract voyage. . . . ."

" The carriers . . . . shall not be accountable for the condition of goods shipped under this bill of lading nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation or other appliances, refrigerating or otherwise, or from any other cause whatsoever. . . . ."

" This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act, 1924, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act."

The meat when it arrived at Liverpool was found to be in a damaged condition, being mouldy, perished, broken, dirty and discoloured.

The plaintiffs alleged that the defendants had not exercised due diligence to make the vessel seaworthy and fit to carry the particular cargo, as they were bound to do under Art. III., r. 1, of the Schedule to the Sea Carriage of Goods Act, 1924, and that there had been unreasonable deviation and delay in the course of the voyage so that the defendants could not rely on the exceptions in the bill of lading. They also said that the damage to the meat was due to the temperature in the hold not being lowered quickly enough or low enough after the meat had been put into the hold.

The defendants alleged that the meat when shipped was of poor quality, and that any damage to it was due to inherent vice. They denied that there had been any deviation or unreasonable delay and relied upon Art. IV., r. 2 (*a*) or (*q*), of the Schedule to the Sea Carriage of Goods Act, 1924.

The *Rimutaka* was detained in Australia for more than ten weeks by a strike of seamen and firemen, with the result that the ship's bottom became very foul. After the termination of the strike the men were very sullen and would not work properly. This fact, coupled with the fact that the Australian coal which they had to buy was very bad, had the result that steam could not properly be maintained in the boilers. The steamer after loading the plaintiffs' cargo proceeded to a number of other Queensland ports and loaded other cargo. Owing to difficulties with regard to the depth of water she went to Cairns to load and then went back to load at Townsville. It was intended to proceed home by the northern route through the Torres Strait and by Batavia, but owing to the great heat and on the master's advice it was decided when the steamer was at Townsville to change the vessel's course, and she came home round the south of Australia.

The vessel had two refrigerating machines which could be used either alternatively or simultaneously, but only one was used on the voyage, as steam was not available in sufficient quantities for driving the ship and also working both refrigerating machines. In order to carry frozen meat safely the temperature in the insulated holds in which frozen meat is carried should be kept at from 15 deg. to 18 deg. F., anything higher than 18 deg. F. being dangerous. The temperatures on this voyage, according to the refrigerating logs, were higher than customary, sometimes going up to 20 deg. or 22 deg. F.

The facts are set out in greater detail in the judgment.

A. T. Miller K.C. and *David Davies* for the plaintiffs.

Jowitt K.C. and *G. St. C. Pilcher* for the defendants.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Jan. 26. WRIGHT J. In this case the plaintiffs claim as bill of lading holders under a bill of lading for refrigerated cargo dated November 24, 1925, in respect of 697 hind quarters of ox beef which were shipped at Gladstone, a port in North Queensland, by the steamship *Rimutaka* in good order and condition and are described as "hard frozen" to be delivered at Liverpool. The bill of lading, which contained the elaborate series of clauses in small print which were previously common, contained also what is called the clause paramount in these terms: "This Bill of Lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act, 1924, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act." That clause renders it unnecessary to consider in this action any of the small print clauses except perhaps the deviation clause. The goods were marked "I.C.E.," which is the third quality produced by the Gladstone works. On delivery at Liverpool they were found to be damaged to the extent of about 3 per cent. of the invoice value. The damage was small in amount and the proportion of damage was not large in itself, but it was made clear in the course of the action that there are other claims of a similar character in respect of refrigerated goods shipped by different shippers and some at other loading ports and of different brands. These claims amount in all to a very substantial sum.

The *Rimutaka* was owned by the New Zealand Shipping Company but on the voyage in question was operated by the Federal Steam Navigation Company, Ld., who are the defendants in the present action and who were putting this vessel as a cargo liner on their line, which is known as the Federal Line. According to the cargo plan there are four insulated holds, of which Nos. 1, 2, and 3 are refrigerated by what is called the battery system, which means that dry cooled air is driven in at the bottom of the hold and sucked out at the top, and in that way it removes part of the heat in the holds and reduces the temperature. The fourth hold, which is abaft the engine space, is refrigerated by a different system, the brine system, but no question in connection with that hold arises in this action. I have noticed, though I was not referred to it at the trial, from the plan that there is a small ship's chamber which appears to be insulated, but no evidence has been given and no point has been taken as to that chamber, which is obviously very small, relatively to the refrigerated holds.

The plaintiffs' cargo was stowed at the bottom of Nos. 1 and 3 lower holds. The *Rimutaka* was generally employed on the New Zealand service, loading in New Zealand ports and going to Europe by the Panama Canal. The voyage on which she was engaged at the time in question was, therefore, somewhat unusual so far as she was concerned. It was also unusual in other and important respects. The original intention was that she should leave Sydney on August 22, 1925, and she was then booked to proceed to various North Queensland ports and to return to Sydney after completing loading and start from Sydney to European ports of discharge by September 29, 1925. She left Sydney in fact on August 19, 1925, having taken on board there 557 tons of bunkers and some cargo, and she reached Brisbane on August 21, but was held up there by a strike, and was actually detained until November 1. She then went to Newcastle, New South Wales, where she took on board 1385 tons of bunker coal, and then sailed for Gladstone, where she arrived on November 15. She there took in a considerable quantity of refrigerated cargo, including the parcel in respect of which this action is brought, from the Gladstone Works, which are a well known freezing company at that port. On November 26 she went back to Brisbane for coal. She, apparently, only took on board 188 tons and that was of poor quality. She left Brisbane on December 5, went to Port Alma, and loaded a refrigerated cargo there, being in that port from December 7 to 11. She then proceeded to Cairns, which is the most northerly port of loading, to load further refrigerated and other cargo and remained there from December 14 to December 23. At that time it was intended that she should proceed on her voyage by the northerly route, which is by the Torres Strait and Batavia. She went from Cairns to Townsville, which was going back on her course, but that was rendered necessary by questions relating to her draught. She was at Townsville from December 24, 1925, to January 7, 1926, and she loaded there a considerable quantity of cargo and also 705 tons of bunkers. At Townsville it was decided, on the advice of the master, to change the vessel's route from the northerly route and instead to go round the south of Australia and then proceed to Colombo and so on to the Mediterranean through the Suez Canal. The reason for that decision was that there was very great heat at the loading ports and it was found that great difficulty was experienced in keeping the temperatures down in the refrigerated holds. These North Queensland ports are in the tropics, and the season was midsummer. The shipping season for frozen meat generally ends somewhere about September, though indeed, as appears from a list put in on behalf of the defendants, it is not by any means unexampled to load frozen refrigerated cargoes in those North Queensland ports in December or January. From Townsville the vessel went south to Sydney where she arrived on January 13 and took in 1304 tons of coal. She then proceeded south of the Australian coast, called at Albany, Western Australia, on January 24, and took on board 200 tons of coal. She then went to Colombo, where she again coaled, and then to Port Said, where she took in further coal and discharged some cargo, and then discharged at Trieste, Genoa, London, Antwerp, and finally at Liverpool, where she arrived on April 12, 1926.

The voyage included many ports of loading and discharge, but it is not suggested that in the main it was not such a voyage as would reasonably be expected in the case of a cargo liner engaged in this trade. Such a vessel would normally go to a considerable range of loading ports in order to fill up and a considerable range of discharging ports in order to discharge her various parcels of cargo. There could be no idea in the case of such a vessel of proceeding from the port at which she loaded for a shipper a particular parcel to the discharging port for that particular parcel, and a shipper who demanded any such course would have to pay a freight which would be entirely prohibitive, and indeed, in ordinary shipping business, there is no idea of any such requirements. The plaintiffs, therefore, do not complain in general of the course which the voyage took, nor do they complain that the original intention to proceed by the northerly route was changed to a voyage round the south of Australia. They have, however, put forward a plea of deviation. I disregard the fact that the voyage was very long, because that depended on other circumstances and, I think, constitutes on the facts of this case no deviation. They rely under that plea on the circumstance that the vessel went to Cairns before she went to Townsville to load and did so at a time when she was intended to proceed by the northerly route. I find in the letters of the master, and particularly in the telegram of November 25, 1925, the explanation of that course, and that is that if she had loaded the substantial part of the cargo which she was booked to load at Townsville she would not have been able to proceed to Cairns and to load. I find, therefore, that there was no unreasonable deviation under the Sea Carriage of Goods Act, which deals with deviation by Art. IV., r. 4. In fact, as it turned out, proceeding from Cairns to Townsville was on the line of her route when it was decided that she should go south. That decision, however, was only made at Townsville, but the fact of that decision would in any case, I think, prevent any damages being recovered in respect of that course being taken, even if I thought it was an unreasonable deviation. The words of the Act about deviation are far from clear and many questions will no doubt some day have to be decided upon them. In particular the expression "reasonable deviation" may give rise to considerable difficulties. I think it is clear that a deviation would not be reasonable merely because it was convenient to the shipowner. Its reasonableness must depend upon what would be contemplated reasonably by both parties having regard to the exigencies of the route, known, or assumed to be known, to both parties, and I think in this case that shippers on a cargo liner of this type must be deemed to have known the circumstances of mercantile geography such as the position as to the amount of water available at Cairns and the probable draught of a vessel of this type, and it is on that ground that I do not think the deviation here, the only deviation which I think is before me, can be regarded as unreasonable. In addition to that, account would have to be taken, I think, of the various terms in the deviation clause. The deviation clause here is very wide and I think too wide to receive complete effect in every part, because every deviation clause must be construed with reference to the contemplated adventure. But I think that the language which gives "liberty . . . . to proceed to and stay at and/or return to any ports or places whatsoever (although in a contrary direction to or out of the route to or beyond the said port of discharge) once or oftener, in any order, backwards or forwards, for the purpose of dry docking (even with cargo on board) or loading or discharging cargo, coal or passengers, or for any purpose whatsoever" ought to receive a reasonable construction in view of the ordinary methods of voyaging adopted by a cargo liner on an adventure of this character, and quite apart from what I have said as to the reasonableness of calling at Townsville, I think calling at Townsville would also have been justified as reasonable having regard to the terms of the deviation clause which I have read. I hold, therefore, that there was no unreasonable deviation and it is, therefore, unnecessary for me to consider what, under the provisions of the Act, would be the effect if there was a deviation which, in the words of the Act, constituted "an infringement or breach of these Rules or of the contract of carriage." As I have said, the voyage here was very protracted; in the case of this particular parcel it lasted for four and a half months from the time of loading. But that was due to a series of difficulties and to the low speeds at which the vessel was proceeding, and such delay in my judgment did not constitute an unreasonable deviation. In any case, the evidence is that, with proper temperatures in the hold, the length of time during which the voyage continued would cause no damage to the cargo. It is not suggested by either side that the ship was unseaworthy in any respect, the plea which the plaintiffs put on the record having been definitely abandoned.

What was the cause of the damage to this cargo? Two theories were put forward. The plaintiffs say that the temperatures in the hold were too high and were not uniform enough for the safe carriage of this cargo. The defendants say that the damage was due to the character of the meat when it was shipped, namely, that it was of low grade, and they rely on inherent vice under Art. IV., r. 2 (*m*), of the Act. The damage on arrival was mould, and by that is meant white mould. The meat was perished and discoloured, the lean portions being dark brown and spongy and the fat pale and rancid. I have heard a good deal of evidence on this point but I find that the evidence relied upon by the plaintiffs is right. I accept in particular the evidence of Mr. Roland

Clarke who surveyed the cargo on arrival and, as I find, made the survey in a reasonable and fair way and on a fair and customary sample. The mark "I.C.E." is a well known brand of refrigerated meat. It is the third or lowest quality of the shippers. It is, however, a generally good class and to a large extent it consists of good quality meat which has become bruised and therefore has had to be scraped or part cut off. It may be that some part of it is rather lean. The bill of lading says that the meat was shipped in apparent good order and condition and as being hard frozen. It is true that it was loaded in very hot weather and in that way perhaps there was some surface thawing. That, however, would not be extraordinary under such circumstances and is a matter which I think should be dealt with in the holds. The Freezing Certificates which accompanied the shipment of meat certified that it was shipped "in good condition, properly dressed, cooled, and frozen . . . . and the period between the time the meat was received into the freezing chambers and shipped per the *Rimutaka* did not exceed 90 days," and that the meat was despatched direct from the works to the ship. It appears that such damage as was experienced as regards this parcel was not peculiar to this parcel but that similar damage was found in goods loaded by different shippers at different ports in different holds and of different qualities. On the whole I accept the evidence that the damage was due to the meat being carried at excessive temperatures and with excessive variations of temperature, and I find that there is no ground for attacking the quality of the meat as being responsible for the damage and no relation between the quality or condition of the meat on shipment and the damage ascertained on discharge. But excessive and irregular temperatures would, in the absence of unseaworthiness, which is not alleged, or some maritime casualty, which is not suggested, prima facie indicate some negligence or default in the care of the cargo on the ship, because the primary duty in carrying refrigerated cargoes is to maintain proper temperatures. In fact it is scarcely disputed that the temperatures on this voyage shown by the refrigerating logs were higher than customary, that is to say, up to Suez where they first became normal. [His Lordship then dealt in detail with the temperatures in the hold and continued :] The main cause of damage was, as I find, that adequate steps were not at once taken, whenever the holds were closed down after loading, to reduce the temperatures and the steps were not taken in proper time. The vessel had two refrigerating machines which were used alternatively or simultaneously. But only one was ever used on the voyage. It worked at full capacity and it worked efficiently. That would, no doubt, have sufficed for the ordinary course of the voyage if the course recommended by the experts as a wise precautionary measure had been adopted—namely, if the second machine had been put on for a short period until the temperatures came down each time after loading and after the hatch covers were put on. The reason given is that during loading, and especially in hot temperatures such as existed during this voyage on loading, the temperatures in the hold must rise ; indeed, the men will not work unless the temperature is brought up to, say, 20 deg., and at the top of the hold it may rise to 30 deg. or more. Furthermore, in hot weather meat, even if hard frozen in the proper sense of the term, may have superficial thawing and moisture, due to temporary exposure to the atmosphere. If there is such moisture on the meat, pollen, which is always present in the atmosphere, will settle upon it and white mould will develop unless the surface moisture is frozen before the pollen can germinate, which would be in about twenty-four or forty-eight hours. Rapid freezing of this surface moisture will stop germination and prevent mould, and once the temperatures are reduced quickly after closing the hold a single machine will cope sufficiently with the situation, and, as I find, would have coped sufficiently with the situation on this ship. Even if it took longer than the twenty-four hours mentioned by one witness and steam was not available in sufficient quantities for driving the ship and also working both refrigerating machines, the ship could have been kept in port until the temperatures were sufficiently down. She was not going at express speed, and a few days longer on such a voyage would not have made much difference. In any case, the ship's duty was to preserve the cargo. I hold that the chief engineer was guilty of an error of judgment in not taking these precautions, that is to say, in not putting on the second machine, as these precautions, I think, would have prevented the damage which the cargo suffered. His error of judgment was, I think, considering all the circumstances, venial, especially considering the difficulties in which he had been placed by the strike, the heat due to the postponement of the voyage, and possibly troubles with the firemen and with the bunker coal. He had been accustomed to the New Zealand trade and found himself in conditions which were somewhat novel to him. All the same, I find that his error of judgment constituted a failure to exercise due care in the custody of the cargo. Much was said about the firemen who may have been rather slack by reason of discontent at having been worsted in the strike, though I feel that enthusiasm in firemen in the stokehold of the *Rimutaka* under the tropical conditions prevailing was too much to expect. I am sure that the engineers did their best to keep them up to their work. As to the coal, the chief engineer said that he did not find fault with some of the coal, and the Brisbane coal, which was bad, only consisted of 188 tons. Much of the other coal was excessive in ash, and none of it was as good as English or Welsh or even New Zealand coal. The ship's speed was poor, at times very poor. The chief engineer put the ship's speed with Australian coal at ten and a half knots, no doubt on the high side, not making allowances for head winds or difficulties of that type. The vessel's bottom at this time was very foul, and allowance has to be made for head winds and currents as well as for the usual cleaning of the furnaces in each watch, which obviously reduces the speed while it goes on. It was said that that source of delay was more than usual on this voyage owing to the high percentage of ash in the coal, but the chief engineer always had steam enough, though he was economizing his steam, to work one refrigerating machine to its full capacity, and to put on the other, if he did not stop in port until he got the temperatures down, would only reduce the speed by one-half to one knot. His lowest speeds on the Australian coast after leaving Brisbane averaged for the day over 6.63 knots with three exceptions of 6, 6.49, and 6.27 knots. Apart from that the average daily speeds up to Sydney were between 7.12 and 9.21 knots. There are at most only about five days when, allowing even one knot loss of average speed for the second refrigerating machine, the ship, with the two refrigerating machines working, would not have done the six knots which the chief mate said he "pretty well" wanted in going down the Barrier Reef. It might have been necessary to wait a few hours to get the temperatures down by the second machine at Gladstone and Brisbane and Port Alma, though I am not satisfied as to that, but not at any later port. However that may be, if it was necessary to wait, then I think it was a proper and necessary step to take for the preservation of the cargo. In truth, the chief engineer, as he candidly said, never thought of putting on the second refrigerating machine except when they contemplated going by the Torres Strait. Apart from that he said he did not put on another refrigerating machine because he did not think it necessary, but that he could have done so if he had considered it necessary. I am not disposed to blame him, but I hold that he committed an error of judgment and that that error, in my opinion, caused the damage to the cargo. For that, in my judgment, the defendants are liable unless they succeed in their defence in law, and for that defence they rely on the exception contained in Art. IV., r. 2 (*a*), of the Sea Carriage of Goods Act.

It thus falls to be decided for the first time under the Sea Carriage of Goods Act, 1924 (I treat the Australian Act as identical with the British Act), what is the extent of the shipowner's obligation where refrigerated cargo during its carriage on shipboard is damaged by the negligent management of the refrigerating machinery by the shipowner's servants. Art. III., r. 2, is in these terms: "Subject to the provisions of Article IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." Art. III., r. 8, provides that: "Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect." It is clear that the obligation to carry, keep, and care for the goods between stowage and discharge is to be performed not by the carrier personally but by his servants, especially those on board the ship during the voyage. A refrigerated cargo depends for its preservation on being carried in insulated holds, kept at the proper temperatures by the due and proper management of the refrigerating machinery. The putting into proper insulated holds appertains to the loading and stowage. Until discharge practically the whole duty as regards the proper caring for the cargo as such is summed up in the due management of the refrigerating machinery so as to maintain correct temperatures. Art. III., r. 2, is, however, subject to Art. IV., which is in the nature of an exception clause. The only relevant "exception" (to adopt the expression of Art. IV., r. 2 (*q*)) is Art. IV., r. 2 (*a*), which is in the following terms: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." It is apparent that if "management of the ship" here includes management of the refrigerating machinery resulting in improper temperatures in the hold to the detriment of the cargo, there is in effect nothing left of the obligation properly to care for such a cargo under Art. III., r. 2. On that view in effect the exception is a general negligence exception, but in the absence of very clear words where words of positive obligation are subject to words of exception, the presumption is that the exception is narrower than the obligation. Refrigerated cargoes are of sufficient importance to call for special reference in Art. III., r. 1 (*c*), but indeed the contention that management of refrigerating machinery is included in the phrase "navigation or management of the cargo," is only part of a general contention that the phrase is a general exception of any negligence in the care of the cargo where such care depends on the "management" of any appliance or part of the ship provided for or adapted to the care of the cargo, such as pipelines and pumping appliances, in the case of liquid cargoes, ventilating appliances, and any special appliances or parts of the ship, such as ventilators, ventilating fans and pumps, the due handling of which is necessary for the proper care of the cargo. In many cases of particular cargoes the effect of this construction of the exception is entirely, and in other cases, largely, to neutralize the positive obligation properly to care for the cargo. No doubt the obligation is "subject to" the exception, but it is necessary to construe the words of the obligation and of the exception together so as to decide if the words of the latter are explicit enough to justify the effect which is contended for. These questions are not limited to caring for the goods during carriage, but also arise in reference to loading and discharging, which operations may be performed by means either of shore cranes or of the ship's derricks and winches. To say that "navigation or management of the ship" includes management of any part of the structure of the ship, even if only used for cargo purposes, would mean that the shipowner would be relieved of liability for damage to cargo caused by the negligent handling of the ship's derricks and winches, and relieved of any obligation by his servants to care for the same, whereas if identically the same operations were carried out in loading or discharging with the same negligence by shore cranes he would be liable—a somewhat anomalous distinction.

Apart from authority, which I shall consider later, I do not think that the scope of Art. IV., r. 2 (*a*), is as wide as the defendants contend, or is so wide as to cover negligence in the due performance of the obligation to care for the refrigerated cargo by keeping down the temperatures in the hold by means of the refrigerating machinery. A negligence or exception clause in a statute, as in a contract, ought, I think, to be strictly construed. The words of Art. IV., r. 2 (*a*), appear to be connected with matters directly affecting the ship as a ship, and not with matters affecting exclusively, or even primarily, the cargo, even though such latter matters involve the user of parts of the ship. The word "navigation" is clearly only applicable to the ship as such, and I think the more general word "management" should be read as ejusdem generis, and the word "ship" should receive the same connotation with each of the substantives on which it is dependent, the word "management" covering many acts directly affecting the ship which could not well be covered by "navigation." The words of the exception are not "in the navigation or in the management of the ship or in the management of any part of the ship necessary for the proper and due care of the cargo," nor are the words, to put it differently, "in the management of the cargo by the use of the ship's parts or appliances."

I see no difficulty in the broad demarcation of the distinction I have just indicated, though there may be border-line cases. The distinction is (to adopt the words of Stirling L.J. in *Rowson* v. *Atlantic Transport Co.* (1)) between negligent acts which have to do with the general management of the vessel and negligent acts which have to do with the management of a portion of the vessel appropriated to the cargo. A modern steamship is not only a complicated steel structure of frames, girders, and plates, but contains complicated machinery such as propelling engines and boilers (which have supplanted masts, sails, and rigging), steam steering gear, ballast tanks and pumps and elaborate piping. Negligence in handling these directly affects the ship in its essential functions of floating, being watertight, being steered and navigated safely and correctly. If a ship is stranded or sunk, if the sea connections are improperly opened, and so on, there is a fault in navigation and management of the ship which directly affects the ship, but there is also in so far as the cargo is thereby damaged by such negligence, a breach of the obligation to care for the cargo, and it is to such negligence in my opinion that the exception of Art. IV., r. 2 (*a*), applies. On the other hand many modern steamships, like the *Rimutaka*, have holds which are insulated and which can be cooled by elaborate refrigerating machinery and apparatus. All this constitutes parts of the ship and of its equipment, but these are solely provided for the care of the special cargo. The ship can, as a seagoing vessel, be safely and efficiently navigated and managed even though the refrigerating equipment is in disorder and the cargo perishing. This equipment is not in use at all on voyages where no refrigerated cargo is being carried. The same is true of the elaborate system of tanks, pipes, and pumps necessary for the carriage of fuel oil. I take these illustrations as sufficient to indicate the distinction between navigation or management of the ship on the one hand and management of the cargo on the other. There are also some parts of the ship which for this purpose may be regarded as ancipitis usus, for instance, the hatches may in one aspect be regarded as part of the outer skin of the vessel, as when decks are actually or potentially swept by seas, so that the proper battening down of the hatches with tarpaulins and cleats is as much a part of the management of the ship as the closing of port holes. Under other circumstances, as in dock or in calm waters, the hatches belong to the management of the cargo, either because they have to be removed for ventilation or kept tight to keep wet from perishable cargo. Similarly ship's derricks and winches may be used for ship's purposes so as to appertain to the management of the ship.

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(1) [1903] 2 K. B. 666, 682.

The construction I have ventured to propound must depend on the precise words of this statute, reading all parts together, but it is, I think, generally in accord with the cases decided on the words "navigation or management of the ship" contained in the American Act of Congress, 1893, generally known as the Harter Act, which in the Courts of the United States has been construed as a statute, and in the Courts of this country as having contractual force when embodied in the bill of lading. The distinction explained above has in such cases (with perhaps one exception) been drawn. The Harter Act contains two clauses prohibiting in contracts of affreightment the insertion of clauses relieving the shipowner from liability for proper care in regard to the cargo or lessening his liability to exercise due diligence to provide a seaworthy ship. In the third clause it gives a conditional statutory exception of (inter alia) "faults or errors in navigation, or in the management of the vessel."

Of the English authorities I may refer to two decisions of Divisional Courts in Admiralty. In *The Glenochil* (1) goods were damaged by water getting into the hold through a broken pipe when the ballast tank was being pumped up to trim the vessel. That was held to be management of the vessel, though not navigation. Gorell Barnes J. said (2): "there will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself." In *The Rodney* (3) the boatswain in order to rid the forecastle of water during heavy weather, in clearing a pipe poked a hole by which seawater got into the hold, and it was held to be an act of management of the ship. Gorell Barnes J. said (4): "the words 'faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo." In neither of these cases had the act done any direct or intended reference to the cargo; in each case the continuity of the ship's defences against the inlet of seawater was interfered with. Certain American decisions exemplify cases where parts of the ship have been used solely or primarily for the care of the cargo, and where these acts have not been held to constitute acts in the management of the vessel, but acts in the care and custody of the cargo. In *Andean Trading Co.* v. *Pacific Steam Navigation Co.* (5), where damage to cargo was due to hatches being improperly left open for ventilation, the Circuit Court

(1) [1896] P. 10.
(2) Ibid. 19.
(3) [1900] P. 112.
(4) Ibid. 117.
(5) (1920) 263 Fed. Rep. 559.

of Appeal (Federal) New York held that the act of leaving the hatches open was not an act "primarily connected with the navigation or the management of the vessel, and not with the cargo." They adopted this mode of expressing the differentation from the Supreme Court decision in *Knott* v. *Botany Mills* (1), where cargo stowed in the fore part of a hold was damaged by drainage from cargo stowed aft of it, the ship being put slightly down by the head so as in no way to affect her seaworthiness. That was held to be neglect in the care of the cargo and not in the navigation or management of the vessel. In *The Jean Bart* (2) a failure to make during the voyage proper use of ventilating apparatus so that cargo was damaged was held not to be an act in the management of the ship, but a failure in the proper care of the cargo. In *The Germanic* (3) the Supreme Court again adopted the limitation of the exception of faults in management of the ship to "faults primarily connected with the navigation or management of the vessel and not with the cargo." The application of the principle to the facts in that case was somewhat striking.

There are two earlier authorities dealing with the care of refrigerated cargoes, one in this country, *Rowson* v. *Atlantic Transport Co.*, before Kennedy J. (4) and in the Court of Appeal (5), the other in America: *The Samland.* (6) In *Rowson's* case Kennedy J. held (7) that want of due diligence in the user of the refrigerating apparatus was "negligence in the management of the ship of which that machinery is a part." He seems to arrive at that conclusion by considering that the original fitness of the refrigerating machinery is necessary to constitute the ship seaworthy, in the artificial sense of being fit to carry the special cargo. In the Court of Appeal the gist of the argument on behalf of the owners of the goods may be found in the following passage (8): "Attending to refrigerating machinery cannot be said to be included

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(1) (1900) 179 U. S. 69, 74.

(2) (1911) 197 Fed. Rep. 1002.

(3) (1905) 196 U. S. 589.

(4) [1903] 1 K. B. 114.

(5) [1903] 2 K. B. 666.

(6) (1925) 7 Fed. Rep. (2nd Series) 155.

(7) [1903] 1 K. B. 117.

(8) [1903] 2 K. B. 671.

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FOREMAN AND ELLAMS, LD. *v.* FEDERAL STEAM NAVIGATION CO.

Wright J.

in the management of the ship merely because it happens to be bolted to the ship and is operated by the ship's engines. It may be that on a particular voyage the machinery may not be required to be used at all. It is essentially an arrangement for the care and custody of the cargo, and the shipowner can only escape liability for his negligent default as regards such care and custody by clear, definite, and express language: mere words of general exemption are insufficient to protect him. Here the successful carriage of these goods depended upon the refrigerating machinery being kept in good working order." The Court of Appeal (1), while affirming the decision of Kennedy J. in the result, did so on the limited ground that the refrigerating apparatus and machinery was not merely used for purposes of the cargo but also for cooling the ship's provisions. The most careful judgment is that of Stirling L.J., who quotes (2) with approval the expressions of the Court to be found in the judgment in *The Glenochil* (3) and *The Rodney*. (4) The learned Lord Justice draws a distinction between a negligent act which had nothing to do with the general management of the vessel, but simply with the management of a portion of the vessel which was exclusively appropriated to the care of the cargo. Vaughan Williams L.J. says (5): "What, for the purpose of s. 3, is the meaning of the words 'in the management of the said vessel'? I say they mean 'in the management of the said vessel qua vessel.'" He adds, on the hypothesis that the refrigerating apparatus was solely for the cargo, "I should, I think, not have been able to persuade myself to come to the conclusion that mismanagement of that special apparatus was a mismanagement of the vessel." No such distinction arises in the *Rimutaka*. It is true that the plan shows a ship's chamber apparently insulated, but it is shown as empty and no point was taken or evidence given that it was refrigerated on this voyage or at all. The ground of distinction is, I venture to think, somewhat artificial, and would enable shipowners, by adding an insulated cool chamber for the ship's provisions and keeping it refrigerated, essentially to change the ambit of their obligation to care for refrigerated cargo, and thus escape liability. The ship's chamber must be almost negligible in size compared with the refrigerated cargo holds. I respectfully think that the matter should be dealt with on a broader ground. The limitation in question has not been approved in the United States: see *The Samland* (1), where it was held that failure properly to control the refrigerating appliances was not a fault in the management of the vessel. The judge said (2) of *Rowson's* case (3): "This case, however, was not followed by Judge Dietrich in *The Jean Bart* (4), and the Circuit Court of Appeals in this [New York] Circuit in *Andean Trading Co.* v. *Pacific Steam Navigation Co.* (5), has expressly approved and followed Judge Dietrich's decision. It is clearly established that s. 3 of the Harter Act is limited in its application to faults 'primarily connected with the management of the vessel, and not with the cargo.'" I may add that even if the provision of refrigerated food for the crew is equated with the provision of fuel for the propulsion of the ship, so that the refrigeration of the ship's chamber forms part of the management of the ship, and the same refrigerating machinery is used for the crew's food and for the cargo, these facts ought not to affect the conclusion that, quoad the refrigeration of the cargo holds, it is the management of the cargo and not of the ship which is involved. But the point does not arise in this case.

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(1) [1903] 2 K. B. 666.

(2) Ibid. 680.

(3) [1896] P. 10.

(4) [1900] P. 112.

(5) [1903] 2 K. B. 675.

There remain to be considered two decisions of the English Court of Appeal under the Carriage of Goods by Sea Act of 1924. In *Hourani* v. *T. and J. Harrison* (6) goods had been stolen during discharge by stevedores' men. It was contended for the shipowners that they were exempted from liability for the theft by Art. IV., r. 2 (*a*), of the Act as being a default in the management of the ship. Bankes L.J. quotes and relies on the various English and American decisions under

(1) 7 Fed. Rep. (2nd Series) 155.
(2) Ibid. 157.
(3) [1903] 2 K. B. 666.
(4) 197 Fed. Rep. 1002.
(5) 263 Fed. Rep. 559.
(6) (1927) 32 Com. Cas. 305.

the Harter Act and applies their principles to the words of the statute in the case before him. Atkin L.J., however, while agreeing with Bankes L.J., adds (1) this caution. He refers to the fact "that at the present day a part of the proper equipment of cargo-carrying ships is very largely concerned with appliances for the safe carrying of the cargo, appliances that have nothing to do with the navigation of the ship but have everything to do with the safety of the cargo, and amongst other things one would mention in particular the refrigerating machinery." He adds in conclusion: "For my part, at the present moment I have a difficulty in seeing if there was a defect in the management of those appliances in the ship which are an essential part of the ship that that would not be a defect in the management of the ship." It is, I think, clear that the learned Lord Justice is not committing himself to any final expression of opinion. The point was not before him and I do not know what authorities were cited. I need not say how carefully I have considered even the tentative opinion or questioning of the Lord Justice, but I do not conceive I can be bound by it.

The other case is *Gosse Millard, Ld.* v. *Canadian Government Merchant Marine, Ld.* (2) In that case the Court of Appeal by a majority reversed the decision of the trial judge who had held that damage to perishable cargo in the ship's hold by rain water, while the ship was in dock, through the hatches or tarpaulins not being properly attended to for the protection of the cargo, fell within Art. III., r. 2, and did not fall within the exception of Art. IV., r. 2 (*a*). There was some difference of opinion in the Court of Appeal. Greer L.J. agreed with the judge of first instance in the view he had taken of the facts, whereas Sargant L.J. differed on the facts, but both seem to assume that management of the hatches is not necessarily management of the vessel. Scrutton L.J., however, who agreed with Sargant L.J. that the appeal should be allowed, did so on the express ground that any user of any part of the ship, even if solely directed to the benefit of the cargo, comes within the exception of Art. IV., r. 2 (*a*). He

(1) (1927) Com. Cas. 320.

(2) [1928] 1 K. B. 717.

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says in terms [1]: "Negligent management of the propelling machinery, which is hardly 'navigation,' and negligent management of the refrigerating or ventilating or pumping machinery, seem all to be equally management of the ship." The Lord Justice would clearly decide this case in a contrary sense to what I am now deciding. As his opinion was not necessary for the decision of the case, and as the other Lords Justices do not express the same opinion, I cannot treat it as binding upon me. I need not say with what anxiety and diffidence I have expressed a view different from that of the learned Lord Justice, but as the question is of vital importance for shippers and receivers of refrigerated cargo and for shipowners, and now arises for the first time under the Act, I have felt it my duty to form and express my own opinion.

In my opinion the exception does not protect the shipowner in this case, and in the result the plaintiffs will recover the amount of their damages

Judgment for plaintiffs.

Solicitors for plaintiffs: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: *William A. Crump & Son.*

R. F. S.

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(1) [1928] 1 K. B. 727.

MARSLAND *v.* TAGGART.

1928
April 30 ;
May 1.

Practice—Summary Jurisdiction—Case stated—Death of Justice after Determination of Complaint—Signature of Case stated by surviving Justices—Jurisdiction of Divisional Court—Summary Jurisdiction Act, 1857 (20 *&* 21 *Vict. c.* 43), *s.* 2.

A complaint was heard by a court of summary jurisdiction consisting of three justices who unanimously dismissed it, but agreed to state a case for the opinion of the High Court under s. 2 of the Summary Jurisdiction Act, 1857. Before the case was stated one of the justices died, and the case was signed by the surviving two justices only :—

Held, that, as the obligation of the justice to sign the case was created by law and not by voluntary contract and as his failure to fulfil that obligation was due to his death and not to any spontaneous act on his part, the Court had jurisdiction to proceed with the matter.

Kean v. *Robinson* [1910] 2 I. R. 306 applied.

CASE stated by Derbyshire justices.

At a court of summary jurisdiction, consisting of three justices, sitting at New Mills, Derbyshire, on June 29, August 3, and August 24, 1927, a complaint was heard and dismissed which had been preferred by the appellant, Joseph Marsland, the surveyor for the Mellor parish of Hayfield, Derbyshire, alleging that the respondent, Aaron Taggart, as a frontager on a street within the parish not being a highway repairable by the inhabitants at large, was liable, under s. 19, sub-s. 2, of the Public Health Acts Amendment Act, 1907, for repairs to that highway which had been executed by the local authority after he had failed to execute them although required to do so. On August 30, 1927, an application was made to the justices to state a case for the opinion of the High Court. The justices agreed to do so, but on September 23, 1927, one of them died, and the case, which was stated on November 18, 1927, was signed only by the surviving two justices.

R. W. Leach (*Montgomery K.C.* with him). As a preliminary objection it is submitted that, as the case stated has been signed by only two of the three justices who heard it, the provisions of s. 2 of the Summary Jurisdiction

Act, 1857 (1), have not been complied with. The Court, therefore, has no jurisdiction to entertain the matter. Sect. 2 of the Act of 1857 contemplates that the case " is to be stated and signed by the justice, if only one, or justices, if more than one, who heard and determined the case" : per Wright J. in a dissenting judgment in *Kean* v. *Robinson*. (2) Accepting, however, the view of the majority of the Court in that case that, where a case was not signed by all the justices who had heard the information or complaint owing to the death or deaths of one or more of those justices, the Court still had jurisdiction to hear the case, *Kean* v. *Robinson* (3) can be distinguished from the present matter, because there the parties had agreed the terms of the case whereas here they have not. In *Barker* v. *Hodgson* (4) it was held that a case stated should be signed by all the justices taking part in the hearing and determination of the information or complaint.

Scholefield K.C. and *Ridgeway Bennett* for the appellant relied on the decision of the majority of the Court in *Kean* v. *Robinson* (5) and referred to *Harvey* v. *Copeland*. (6)

LORD HEWART C.J. The objection which is taken here is that the Court has no jurisdiction to hear this appeal by way of case stated by reason of the fact that the case is signed by only two of the three justices who heard the complaint, the third having died between the date of the justices' decision on that hearing and the date of the statement of the case.

There is no doubt that in ordinary circumstances all the justices who have heard an information or complaint are required to state and sign a special case. As was said by Lord Alverstone C.J. in *Barker* v. *Hodgson* (4): " I attach considerable importance to the signatures of all the justices being affixed to a case, especially of the minority, in a case like this where there has been a difference of opinion." That judgment was concurred in by Darling and Channell JJ. But in that case the reason why some of the justices had refrained from signing the case was that they dissented from the decision of the majority of the Court. The present case raises no such question. Nothing depends on the volition of any individual. The signature is absent because the signatory is dead.

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(1) By the Summary Jurisdiction Act, 1857, s. 2: " After the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way . . . . either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination as being erroneous in point of law, apply in writing . . . . to the said justice or justices, to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law . . . ."

(2) [1910] 2 I. R. 306, 314.

(3) [1910] 2 I. R. 306.

(4) [1904] 68 J. P. 310.

(5) [1910] 2 I. R. 310.

(6) (1892) 32 L. R. Ir. 419.

In *Kean* v. *Robinson* (1) a case, the draft of which had been agreed on behalf of the parties, had been approved and signed by one of three justices who had heard the complaint. The second justice had also approved the case, but he had died without signing it, while the third justice had died without having either approved or signed it. The question arose whether the King's Bench Division in Ireland had jurisdiction to hear the case, and the majority of the Court decided that it had. One, at any rate, of the grounds of that decision was concisely stated by Madden J. when he said (2): "An authority which affords a satisfactory basis for my judgment is *Reg.* v. *Leicestershire Justices.* (3) In that case the sending of notice of appeal was, by the statute, a condition precedent to the right of appeal. The person upon whom the notice should have been served was dead at the time of posting the notice. It was held—I quote from the judgment of Patteson J.—'that, as the duty of the appellant to give such notice was cast upon him by the law, not by his own voluntary contract, he is excused from performing that duty by its becoming impossible by the Act of God.'" Those words of Patteson J. were also cited with approval by Lord O'Brien C.J., who said (4): "This is the language of Patteson J., stating what is now the well-established law. It draws the familiar distinction between a duty created by law and a duty created by voluntary contract, when a party can introduce any stipulation he likes." Those observations

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(1) [1910] 2 I. R. 306.
(2) [1910] 2 I. R. 319.
(3) (1850) 15 Q. B. 88, 92.
(4) [1910] 2 I. R. 321.

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were made as illustrating the principles: "Actus Dei nemini injuriam facit" and "Lex non cogit ad impossibilia." *Kean* v. *Robinson* (1) went to the Court of Appeal in Ireland (2), where the Court ordered the case to be struck out, because the decision of the King's Bench Division, which had been said to have no jurisdiction, was final.

In my opinion, similar considerations apply here. As the reason of the absence of the signature is the death of the justice who would otherwise have signed, this Court has jurisdiction to proceed with this matter.

AVORY J. I agree.

SHEARMAN J. I am of the same opinion. Justices come and go, but justice itself should endure. I see no reason to uphold an objection which would result in justice coming to an end owing to the death of a magistrate because s. 2 of the Summary Jurisdiction Act, 1857, is worded as it is. This sort of objection ought to be as extinct as the thumbscrew.

Preliminary objection overruled.

The COURT proceeded to hear the appeal on its merits and to allow it.

Appeal allowed.

Solicitor for appellant: *P. R. Christie, for Boddington, Jordan & Bowden, Manchester.*

Solicitors for respondent: *Gibson & Weldon, for H. S. Sleigh, Denton.*

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(1) (1910) 2 I. R. 306.

(2) [1910] 2 I. R. 323.

G. F. L. B.

NEAL *v.* GUY.

1928
May 8.

Hackney Carriage—By-law—Regulation as to Number of Persons to be carried in "omnibus"—Application to Motor Omnibus.

The by-laws of an Urban District Council with respect to omnibuses were made in 1877, before motor vehicles had come into use. The earlier part of by-law 14 contained a provision that no greater number of persons should be conveyed in "any omnibus" than was there indicated; while the subsequent part of that by-law and certain other of the by-laws contained references to horse omnibuses. On a day in 1927 the respondent, who was the driver of a motor omnibus plying within the district, carried in his omnibus a greater number of passengers than was authorized by the provision in the earlier part of by-law 14:—

Held, that that provision applied to motor omnibuses as well as to horse omnibuses, and that the respondent was liable for a contravention of the by-law.

CASE stated by justices for the county of Durham.

An information was preferred by Frederick Neal, the hackney carriage inspector for the Urban District Council of Bishop Auckland (hereinafter called "the appellant"), under the hackney carriage by-laws of the Urban District Council, against Albert William Guy (hereinafter called "the respondent") for that he on October 8, 1927, at the township of Bishop Auckland, then being the driver of a certain omnibus No. 209 in a highway therein called Cockton Hill Road and licensed to carry 39 persons unlawfully carried therein 55 persons in contravention of by-law 14 (1) duly made

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(1) The Hackney Carriage By-laws of the Bishop Auckland Urban District Council, dated May 26, 1877, contained a section which was headed: "By-laws made by the Urban District Council of Bishop Auckland with respect to Omnibuses in the Urban District of Bishop Auckland." That section contained the following by-law:—

"14. Every proprietor, driver or conductor of an omnibus shall comply with the following provisions for regulating the number of persons to be carried by omnibuses.

"No greater number of persons shall be conveyed in any omnibus than will admit of the provision of adequate sitting accommodation to the extent at least of sixteen inches from side to side and fifteen inches from front to back of every seat in respect of each person conveyed in or upon such omnibus, and also of adequate accommodation to enable every such person to sit with ease.

"No greater number than five persons, exclusive of the driver and conductor, shall be carried at any and published by the Urban District Council with respect to omnibuses and then in force.

On November 10, 1927, the information was heard by the justices, when it was proved or admitted that the by-laws had in 1901 been approved by the Ministry of Health, and had not subsequently been amended or revoked; that the omnibus No. 209 was in fact licensed by the Urban Council to carry 39 passengers; and that the respondent was at the time of the alleged offence carrying 55 passengers.

It was contended on behalf of the appellant that by-law 14 (1) regulated in general the number of persons to be carried by omnibuses plying for hire in the urban area, that the first paragraph of the by-law applied to a motor omnibus as well as to a horse-drawn vehicle, and that the fact that the subsequent paragraphs of the by-law contained references to horses was immaterial.

It was contended for the respondent that the by-laws were obsolete, as they were obviously intended to apply to horse-drawn vehicles and not to mechanically propelled vehicles.

The justices, being of opinion that the by-laws were intended to apply to horse-drawn vehicles, and not to mechanically propelled vehicles, held that the by-laws were obsolete, and did not apply to motor omnibuses, and dismissed the information.

The question for the Court was whether upon the above statement of facts the justices came to a correct determination and decision in law.

H. C. Davenport for the appellant.

The respondent did not appear personally or by counsel.

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one time by any omnibus drawn by one horse.

"No greater number than sixteen persons, exclusive of the driver and conductor, shall be carried at any one time by any omnibus drawn by two horses.

"No greater number than twenty persons, exclusive of the driver and conductor, shall be carried at any one time by any omnibus drawn by three horses.

"For the purpose of the foregoing rules two children under the age of ten years may be regarded as one person."

That section also contained other by-laws which referred expressly to omnibuses drawn by horses, and it imposed penalties for contraventions of the by-laws.

LORD HEWART C.J. This seems to me to be a clear case. The question is whether the justices were right in law in holding that the by-law referred to applies only to horse-drawn omnibuses and not to motor omnibuses. That by-law, which is by-law 14 of the by-laws made by the Urban District Council of Bishop Auckland with respect to omnibuses, provides that every proprietor, driver or conductor of "an omnibus" shall comply with certain requirements regulating the number of persons to be carried by omnibuses. Then follow various provisions, and among others a provision that no greater number of persons shall be conveyed in "any omnibus" than will permit adequate sitting accommodation to the extent there specified for each person conveyed in or upon such omnibus. It is stated in the case that the omnibus driven by the respondent was licensed by the Urban District Council to carry 39 passengers, and that on the occasion of the alleged offence it was carrying 55 passengers. It seems to me that there is no reason for supposing that these provisions of the by-law refer only to horse-drawn omnibuses and are not equally applicable to motor omnibuses. It matters not that some other provisions may not be equally applicable. In my opinion the case should be remitted to the justices with a direction to convict the respondent.

AVORY J. I agree. The fact that some of the provisions of these by-laws do not apply to motor omnibuses appears to me to be no answer to the argument that the provisions in question do apply to them.

SHEARMAN J. I agree.

Appeal allowed. Case remitted.

Solicitors for appellant: *Corbin, Greener & Cook, for J. T. Proud & Son, Bishop Auckland.*

J. R.

1928
May 11.

LAWRENCE *v.* MARTIN.

Justices—Appeal by Clerk to Urban Council—Case stated—Recognizance by Clerk "duly authorised"—Surplusage—Summary Jurisdiction Act, 1857 (20 *&* 21 *Vict. c.* 43), *s.* 3—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 259.

On the application of a clerk of an urban district council for a case to be stated for the opinion of the High Court, the clerk himself entered into the recognizance conditioned to prosecute the appeal, rendered necessary by s. 3 of the Summary Jurisdiction Act, 1857. On a preliminary objection at the hearing of the appeal that the recognizance should have been entered into by the clerk on behalf of the council, so as to render their goods liable, for the reason that the council had by resolution authorized the clerk to lay the original information and, if unsuccessful, to carry the proceedings further, and that the clerk "duly authorised" had sworn the information, and entered into the recognizance "as principal":—

Held, that the recognizance was good, in that in fact the clerk as the informant was the appellant, being at liberty by virtue of s. 259 of the Public Health Act, 1875, to institute and carry on any proceedings which the local authority was authorized to institute, and that, consequently, the above words of authorization were surplusage.

Leyton Urban Council v. *Wilkinson* [1927] 1 K. B. 853 distinguished.

Case stated by Eastleigh justices.

The appeal (which is reported on the preliminary objection only) was against the refusal of the justices to convict the respondent, Frederick George Martin, of an offence—slaughtering pigs without using a humane killer—under a local by-law. The alleged offence was committed on November 17, 1927. By a resolution of the Eastleigh Urban District Council dated November 24, 1927, it was resolved that proceedings should be taken against the respondent before the justices and that their clerk, the appellant, Jesse Lawrence, "be authorised to lay the necessary information and do all things necessary in connection with such proceedings in the name of and on behalf of the council." By a further resolution dated December 1, 1927, the council resolved that if a conviction were not secured the case should be taken further. On the same date the appellant swore an information against the respondent as being that of "Jesse Lawrence . . . . clerk to the urban district council of Eastleigh and

Bishopstoke, duly authorised," and a summons was duly issued and heard on December 12, 1927, and dismissed by the justices. On December 16, 1927, the appellant applied to the justices to state a case for the opinion of the High Court, setting forth "Whereas an information wherein I the undersigned Jesse Lawrence was informant and Frederick George Martin was defendant was heard . . . . and determined." On February 13, 1928, the appellant entered into a recognizance the material parts of which were as follows: "Be it remembered that . . . . Jesse Lawrence . . . . clerk to the urban district of Eastleigh and Bishopstoke, as principal [with two others as sureties] came before one of his Majesty's justices of the peace . . . . and severally acknowledged themselves to owe to our Sovereign Lord the King the several sums following [set out] . . . . to be made and levied of their several goods and chattels lands and tenements respectively . . . . if he the said Jesse Lawrence shall fail in the condition indorsed," the condition being to prosecute the appeal.

Montgomery K.C., *Sir H. Maddocks K.C.* and *W. J. Gandy* for the respondent. There is a preliminary objection to this appeal being heard. By s. 3 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), the appellant on making application for a case to be stated must enter into a recognizance to prosecute the appeal. In the present case the appellants were in reality, though not in name, the urban district council, as appears by their resolution of November 24, 1927, in which their clerk, Jesse Lawrence, was authorized by them to act "in the name of and on behalf of the council," and by the further resolution dated December 1, 1927, whereby the council resolved that if necessary the case should be taken higher, which necessity in fact arose. Thereby the clerk was authorized to act on behalf of the council in bringing this appeal. Consequently, the clerk swore the information as "clerk to the urban district council," adding the words "duly authorised." All this showed that the council were the real appellants in the case. Notwithstanding this, when their clerk came to enter into the recognizance he did so, not on behalf of the council, the real appellants, but "as principal," and his (and the sureties') goods and chattels only were rendered liable in case the appeal was not prosecuted, and not those of the council. The case is therefore covered by *Leyton Urban Council* v. *Wilkinson.* (1)

Scholefield K.C. and *Sydney Turner* for the appellant. The council were not the appellants; their clerk was the appellant under s. 259 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), which enacts that "their [the local authority's] clerk, or any officer or member so authorised shall be at liberty to institute and carry on any proceeding which the local authority is authorised to institute and carry on under this Act." The appellant needed no authorization, and the words in the information "duly authorised" were surplusage.

[He was stopped.]

Montgomery K.C. in reply. It is agreed that the clerk can act without authorization; but then he must do so personally and not on behalf of his council. Sect. 259 of the Act of 1875 ought to be read with s. 253, which enacts that proceedings for the recovery of a penalty shall only be taken by the party aggrieved or by the local authority. Then s. 259 says that the local authority may appear by their clerk or their clerk may appear without their authority. The resolutions of the council show that the council authorized their clerk to act for them, and that they were the real appellants.

[AVORY J. You should have objected at the hearing that the wrong party was before the court.]

But it was not then known that the clerk would assume to act on his own account. He appeared as "duly authorised" in the summons, that is, as duly authorized by the council, which showed that he was acting on behalf of the council.

LORD HEWART C.J. In this case the preliminary point is taken that s. 3 of the Summary Jurisdiction Act, 1857, has

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(1) [1927] 1 K. B. 853.

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not been complied with. That section requires that the appellant at the time of making application for a case to be stated by justices shall in every instance enter into a recognizance, with or without surety or sureties, conditioned to prosecute without delay such appeal, and to submit to the judgment of the superior Court and pay such costs as it may award. The person upon whom that duty is cast is the appellant. The argument has been put forward that the present case is on all fours with *Leyton Urban Council* v. *Wilkinson.* (1) But in that case the ground of complaint was that the appellants, the Leyton Urban District Council, had not entered into any recognizance at all. In that case, ex concessis, the council were the appellants, but it was not the council who had entered into the recognizance. Now the urban council in the present case are not the appellants, but Mr. Jesse Lawrence, their clerk, is the appellant. And why is he appellant? The answer is because he was the informant. It was he who laid the information, and it was he who, afterwards, applied in writing for the statement of the case; and he was able to do those things by virtue of s. 259 of the Public Health Act, 1875, which provides amongst other things that the clerk of any local authority shall be at liberty to institute and carry on any proceedings which the local authority is authorized to institute and carry on under the Act. But it is said that the clerk in this case in the information employed not merely the words "Clerk to the urban district council," but added "duly authorised." The information does not say by whom or by what authorized, and it is common ground that these words are unnecessary. In my opinion they are really surplusage. The clerk, to use the words of the statute, was at liberty to institute these proceedings precisely because he was clerk to the urban district council, and it was not necessary to say that he was duly authorized to lay the information. The argument is that he has chosen to represent himself for the purpose of this information, or that somebody has chosen to represent him, as being the authorized agent of the council,

(1) [1927] 1 K. B. 853.

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and that, consequently, there is a discrepancy between the form of the information and the form of the recognizance, and that the recognizance ought also to have recited that he was authorized to act for the council, and so have made the goods and chattels of the council liable in a certain event. It seems to me that the simplest answer to that argument is, that once it is conceded that on the true construction of s. 259 of the Act of 1875—and that it is so has been repeatedly held—the clerk does not need any special authorization, but is authorized by the joint effect of his office and the provisions of s. 3 of the Act of 1857, then these words " duly authorised " are no more than a superfluous reference to s. 259. I think that the clerk was the informant, as he was legally entitled to be, and I think he is the appellant, as he is legally entitled to be; and it is the appellant who has to enter into the recognizance. I think, therefore, that the preliminary objection fails.

AVORY J. I agree.

SHEARMAN J. I agree.

[The appeal was then heard on its merits and was allowed.]

Solicitors for respondent: *Sharpe, Pritchard & Co., for Ryland, Martineau & Co., Birmingham.*

Solicitors for appellant: *Lees & Co.*

W. L. L. B.

PICKUP *v.* DENTAL BOARD OF THE UNITED KINGDOM.

1928
May 10.

Dentist—Erasure of Name from Register for Conviction of Misdemeanour—Conviction by Court of Summary Jurisdiction—"Misdemeanour"—Dentists Act, 1878 (41 *&* 42 *Vict. c.* 33), *s.* 13.

The words in s. 13 of the Dentists Act, 1878, "convicted . . . . of . . . . misdemeanour" refer to conviction, whether summarily or on indictment, of any offence less than felony, and are not confined to convictions on indictment for misdemeanour.

Appeal from an order of the General Medical Council removing the appellant's name from the dentists register.

The appellant, Mr. James Pickup, a dentist, had been convicted under a local by-law before a court of summary jurisdiction of an offence described as "gross indecency"—namely, indecent exposure of his person in a public urinal. He was also convicted summarily of three other offences, including one of importuning for immoral purposes. In consequence his name, by the order appealed against, had been erased from the register under the provisions of s. 13 of the Dentists Act, 1878 (41 & 42 Vict. c. 33), as amended by s. 8 of the Dentists Act, 1921 (11 & 12 Geo. 5, c. 21). Sect. 13 of the Act of 1878 provides: "Where a person registered in the dentists register has, either before or after the passing of this Act, and either before or after he is so registered, been convicted either in [His] Majesty's dominions or elsewhere of an offence which, if committed in England, would be a felony or misdemeanour, ... that person shall be liable to have his name erased from the register. . . . Provided that the name of a person shall not be erased under this section . . . . on account of a conviction for an offence which, though within the provisions of this section, does not, either from the trivial nature of the offence or from the circumstances under which it was committed, disqualify a person for practising dentistry." The Dental Board held an inquiry under s. 8, sub-s. 1 (*b*), of the Act of 1921, and reported the facts and their findings to the General Medical Council, who eventually made the order appealed against.

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The appellant appealed from this order to the High Court under s. 9 of the Act of 1921.

Maurice Healy for the appellant. The appellant is not within the words of s. 13 of the Act of 1878, for the offences of which he was convicted were not misdemeanours within the meaning of the section. "Misdemeanour" therein means misdemeanour of which there has been a conviction on indictment. That is a word which is used in a technical sense and a loose sense, and its juxtaposition with "felony" shows that in the section the technical sense was intended.

[AVORY J. Was not the conviction of one at least of the four offences charged—that of importuning for immoral purposes—indictable under s. 1, sub-s. 1 (*b*), of the Vagrancy Act, 1898 (61 & 62 Vict. c. 39), and s. 7, sub-s. 5, of the Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20)?]

Yes, but in fact the conviction was by a court of summary jurisdiction. It is not sufficient that the charge could have been tried on indictment.

[*Du Cros* v. *Lambourne* (1) was referred to.]

Whiteley K.C. (*D. C. Bartley* with him) for the respondents. The appellant was convicted of a misdemeanour within the meaning of s. 13. In Russell on Crimes, 8th ed., vol. i., p. 10, it is stated that "The word misdemeanour is applied to all offences (whether at common law or by statute) which are below the degree of felony, whether they are punishable on indictment or on summary conviction," citing Burn's Justice, 30th ed., vol. iii., tit. Misdemeanour, p. 1008. The reference in the proviso to s. 13 to the offence being trivial, shows that offences other than indictable offences are referred to; for an indictable offence can never be trivial.

[He was stopped.]

Healy replied.

LORD HEWART C.J. This is an appeal from a decision of the General Medical Council under the provisions of s. 9 of the Dentists Act, 1921. The question of substance raised by

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(1) [1907] 1 K. B. 40, 44.

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the appeal is, What is the true meaning of the expression "misdemeanour" in s. 13 of the Dentists Act, 1878?

The scheme and method of that section are quite clear. It provides that the General Council may, in certain circumstances, erase a name from the dentists register, and in particular "Where a person registered in the dentists register has, either before or after the passing of this Act, and either before or after he is so registered, been convicted either in [His] Majesty's dominions or elsewhere of an offence which, if committed in England, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, that person shall be liable to have his name erased from the register." Then follows a proviso: "Provided that the name of a person shall not be erased under this section . . . . on account of a conviction for an offence which, though within the provisions of this section, does not, either from the trivial nature of the offence or from the circumstances under which it was committed, disqualify a person for practising dentistry."

It is contended on behalf of the appellant that the word "misdemeanour" in this section means misdemeanour triable on indictment. In my opinion that contention cannot be supported. In the first place, as was observed by Lord Alverstone in the case of *Du Cros* v. *Lambourne* (1), citing Burn's Justice, 30th ed., vol. iii., p. 1008, tit. "Misdemeanour": "This word, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name. . . . A misdemeanour is, in truth, any crime less than felony; and the word is generally used in contradistinction to felony; and misdemeanours comprehend all indictable offences which do not amount to felony." That is to say, misdemeanours include such indictable offences but are not limited to them. And even if, generally speaking, misdemeanour meant an indictable offence, when one looks at the very words of s. 13 I think it is made clear that "misdemeanour" in this context at any rate is not limited to indictable misdemeanour. It seems to be plain from the proviso that it was contemplated that the offences in question might be of a trivial nature and that because of their trivial nature the person whose case was being considered might be allowed to continue his name upon the register, although, because the offence had been committed, he was liable to have it erased. The scheme of the section and of the proviso seem clearly to contemplate that the words of the section may be fulfilled and so the liability to erasure may be incurred, although the offence is of so trivial a nature that the proviso ought to be applied and the name ought not in fact to be erased. That seems to me, apart from other matters, to make it clear that in the construction of this section the word "misdemeanour" is not limited to misdemeanour triable on indictment. I think therefore that the appeal should be dismissed.

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(1) [1907] 1 K. B. 40, 44.

AVORY J. I am of the same opinion. The offence, which is described as the offence of committing an act of gross indecency in a public urinal in Victoria Square, is in my opinion a misdemeanour within the meaning of the Dentists Act, 1878. I think the word is there used in its widest signification, and not, as in some cases, limited to offences which are punishable only on indictment. With regard to the other offence, the more serious one, it is clear that although the appellant was proceeded against summarily, the offence which he committed was in fact an indictable misdemeanour. Therefore, I have no doubt that the objections which are here made on this appeal fail.

SHEARMAN J. I am of the same opinion. The word "misdemeanour" in its ordinary sense, as appears in all the text-books relating to the subject, means all those crimes and offences for which the law has not provided a particular name and which are punishable, according to the degree of the offence, by fine or imprisonment. That is the meaning except in cases where the context forces the Court to hold that it means indictable misdemeanour. To my mind it is clear that in this particular statute it has the broad meaning

I have indicated. The words I have used come from the early editions of Burn's Justice. (1) Blackstone's language is very similar. (2)

Appeal dismissed.

Solicitors for appellant: *Gregory, Rowcliffe & Co., for Hall & Smith, Bury.*

Solicitor for respondents: *C. J. S. Harper.*

W. L. L. B.

COTTAGE CLUB ESTATES, LIMITED *v.* WOODSIDE ESTATES COMPANY (AMERSHAM), LIMITED.

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Oct. 28;
Nov. 3.

Assignment of Debt—Building Contract—Arbitration Clause—Absolute Assignment—Legal and other Remedies—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 136.

A contract between builders and owners for the erection of houses contained an arbitration clause. The builders by deed of mortgage assigned "all moneys due or to become due under the contract" to their bankers as security for an overdraft, and due notice was given of this assignment. On the completion of the houses disputes arose as to the amount payable to the builders, and upon an arbitration between the builders and owners the owners contended that the builders could not maintain their claim, because under the assignment and notice their rights had passed to the bank by virtue of the Law of Property Act, 1925, s. 136, sub-s. 1. The arbitrator made an award that the builders were entitled to recover 488*l.* from the owners, but stated a special case for the opinion of the Court and made an alternative award that if the Court should hold in favour of the owners, then the builders were not entitled to recover anything:—

Held, that the arbitration clause could not be, and was not here, transferred: that the arbitrator had jurisdiction to deal with the dispute, but that he must do so having regard to the legal position created by the parties, and that as the builders had assigned the money due to them under the contract to third parties, the award in their favour could not be upheld.

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(1) E.g., the third edition (1756), p. 478, giving Barlow as his authority.

(2) Comm. iv. 5, where he says that crimes and misdemeanours, "properly speaking, are mere synonymous terms: though, in common usage, the word 'crimes' is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of 'misdemeanours' only." [Blackstone seems to have purposely avoided using the word "felony," possibly because he had just noticed the existence, at least when the Commentaries were first published in 1765, of statutory felonies which no reasonable person would call crimes. —F. P.]

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AWARD stated in form of special case.

By contract dated December 15, 1925, and made between the claimants, described as "the contractors," the respondents, described as "the building owners," and other parties not here material, the contractors agreed to build sixteen houses at Rickmansworth upon the terms and conditions therein set out. By clause 15 of the contract any dispute arising under the contract between any of the parties was to be submitted to a single arbitrator under the Arbitration Act, 1889, to be appointed by the President of the Surveyors' Institute.

On August 30, 1926, the contractors by deed of mortgage assigned to the Bank of Liverpool and Martins, Ld., "all moneys due or to become due under the contract," to hold unto the mortgagees absolutely, subject to the usual proviso for redemption, as security for an overdraft of 294*l.*

Due notice of this assignment was given to the building owners. The houses were by this time completed and, disputes arising as to the amount payable in final settlement, these were referred to arbitration under clause 15 (supra).

The building owners contended before the arbitrator that the contractors were not entitled to claim from them, having assigned their rights to the bank by deed, of which due notice was given.

The arbitrator made his award in alternative form, finding (1.) that the contractors were entitled to recover 448*l.* from the building owners; but (2.) that if the Court should hold that the building owners were right in their contention, then the contractors were not entitled to recover anything. The question for the Court was whether the deed of assignment and notice precluded the contractors from maintaining their claim.

Cave K.C. and *Graham Mould* for the building owners. Here there is an absolute assignment of a legal thing in action under the Law of Property Act, 1925, s. 136. The effect is to transfer to the assignees as from the date of the notice (*a*) the legal right to the debt; (*b*) all legal and other remedies. (1) The legal remedy is the action at law. "Other remedies" include the right to arbitrate.

If the right to arbitrate is not transferred, at all events the contractors are not entitled to an award from the arbitrator that this sum of 448*l.* is due to them. The legal right to recover is vested in the bank, and the award that the contractors are entitled to recover 448*l.* from the building owners is invalid. A party may be authorized by power of attorney to submit to arbitration, and also to bring an action upon the award in his own name: Russell on Arbitration and Award, 11th ed., p. 28.

Barrington-Ward K.C. and *Bensley Wells* for the contractors. We admit that the assignment here is absolute, on the authority of *Tancred* v. *Delagoa Bay and East Africa Ry. Co.* (2) But the arbitration is not a "remedy" which passes under the assignment by virtue of the Law of Property Act, 1925, s. 136. It is a personal covenant between the contracting parties, and provides as to the manner in which the debt is to be ascertained.

The assignment is not of the contract, but of such moneys as are "due or to become due" thereunder, that is, subject to the terms of the contract as between contractors and owners.

Further, the award is right in terms. The arbitrator sits to express his views on the contract. It is for the bank either to bring an action or take out a summons, if necessary, to enforce the award. The building owners cannot do so because of the assignment. The award is in itself valid, and the law merely alters its effect by directing payment to the bank instead of to the claimants, as the result of the assignment.

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(1) Law of Property Act, 1925, s. 136, sub-s. 1: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor . . . . is effectual in law . . . . to pass and transfer from the date of such notice—(*a*) the legal right to such debt or thing in action; (*b*) all legal and other remedies for the same; and (*c*) the power to give a good discharge for the same without the concurrence of the assignor."

(2) (1889) 23 Q. B. D. 239.

Cave K.C. in reply. An arbitration is not a mere valuation. The arbitrator definitely declares 448*l.* to be due from the building owners to the contractors, and this cannot be left in the air. If the building owners pay the money to the contractors as directed, they will not get a proper discharge for the debt. The award is invalid and the alternative award should be substituted.

Cur. adv. vult.

Nov. 3. WRIGHT J. [after stating the facts and reading the award and special case continued :] The point here raised appears to be free from authority. For the building owners reliance was placed upon the provisions of the Law of Property Act, 1925, s. 136, sub-s. 1, and it was argued that by virtue of these provisions the rights under the arbitration clause were transferred from the contractors and vested in the bank as coming within the description of "all legal and other remedies for the same." That argument is not well founded. The arbitration clause is a personal covenant, and cannot be transferred; nor indeed was it transferred in any sense in this case. The arbitration clause remained in full force and effect as between the original parties, the building owners and the contractors, and they were entitled to go to arbitration, as indeed they did. The arbitrator appointed under the clause was bound to entertain that claim and come to such conclusion as, on the terms of the contract and the relevant legal considerations, he thought to be just and proper.

Counsel for the building owners principally rely on the second contention, which was that the assignment has divested the contractors of their right to claim from the building owners the moneys due under the contract, and they claim that this is within the express terms of s. 136, sub-s. 1, of the Law of Property Act, 1925. They contend that the legal right to the debt or thing in action has passed away from the contractors entirely, and that they are now unable to give a good discharge for the debt if they should be paid that debt under the award or otherwise by the building owners.

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Counsel for the contractors contended that the first award of the arbitrator is right. They very properly admit that the assignment in question to the bank was a good and absolute legal assignment of an unquantified debt within the meaning of s. 136, sub-s. 1. They argued however that the arbitrator was bound as between these two parties to quantify by his award the amount of that unascertained debt. They conceded that an award so made could not receive effect except by order of the Court, and they contended that that order would not be made, because once the award was made, the law by virtue of the assignment would transfer the debt to the assignee—namely, the bank. I do not think that these contentions are right. It seems to me that the arbitrator had jurisdiction, under the arbitration clause, to deal with this dispute. In dealing with the dispute it was his duty, not merely to consider the terms of the contract within the limits of the document, but to consider the application and enforcement of these terms having regard to the legal position which the parties had created. In this case the contractors by their own act have divested themselves of their right to claim the debt. That fact was before the arbitrator, and in considering the rights of the parties he was bound to give effect to that legal consideration. What he has done is to award that the contractors are entitled to recover the sum of 448*l.* 17*s.* 5*d.* against the building owners. If that award were to stand and to receive effect, the position would be that the building owners would have to pay that amount to persons who are not now their creditors and who could not give them a discharge for the debt. They would be liable to pay the same amount over again to the bank, and could not plead fulfilment of the award as any defence to a claim on the part of the bank. It may be that if the award were to come before the Court and the contractors were to seek to enforce it in its present form, the Court, reading the award, would be bound to say that it was bad on its face and that the conclusion was inconsistent with the facts set out in the award and the premises; but that is the very question which I have now to consider and which I must consider. I think that the

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Court, on a motion to set aside the award, would be bound to hold it bad on its face, and I hold that the award stated in the form of this special case cannot be upheld.

It was contended for the contractors that the assignment was a matter entirely irrelevant to the arbitrator and outside his jurisdiction. I do not think that contention is right. An arbitrator may have to take into account, if such points are raised under an arbitration clause under a contract, matters arising under the general law, such as the Statute of Limitations, supervening illegality, impossibility of performance, or frustration, and in the same way he cannot close his eyes to the fact that the claimant, who comes to him for an award that he is entitled to recover moneys from the respondent, has in fact assigned those moneys away by valid legal assignment to some third party who is not before the arbitrator, and who is not a party to the arbitration or to the arbitration clause.

That being so, the award of the arbitrator in which he finds that the contractors are entitled to recover 448*l.* against the building owners cannot be upheld, and the alternative award must receive the sanction of the Court. According to that award the contractors are not entitled to recover anything against the building owners, and the building owners are entitled to recover from the contractors the taxed costs of the arbitration and the costs of the award. (1)

Solicitors for building owners: *Lea & Lea.*
Solicitors for contractors: *Wingfields.*

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(1) An appeal from this decision was entered but not proceeded with.

F. P. F.

[IN THE COURT OF APPEAL.]

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May 16, 17.

EDWARD CURRAN AND COMPANY, LIMITED *v.* KAYS.

Workmen's Compensation—Infant Workman—Accident—Permanent Incapacity—Employment at light Work—Wages increased on Threat to apply for Review—Review by Agreement—Period within which Review permitted—Applicability of Statute coming into force after Accident—Application for Redemption—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 11, *sub-s.* 2; *s.* 13—*Workmen's Compensation Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 42), *s.* 1.

The Workmen's Compensation Act, 1925, s. 11, sub-s. 2, provides: " Where the workman was at the date of the accident under twenty-one years of age and the review takes place more than six months after the accident and before the workman attains the age of twenty-one years, the amount of the weekly payment may be increased. . . . ." The Workmen's Compensation Act, 1926 (which came into force on December 15, 1926), provided that for the words, " and before the workman attains the age of twenty-one years," in s. 11, sub-s. 2, there should be substituted the words, " and the application for the review is made before or within six months after the workman attains the age of twenty-one years " :—

Held, that a workman, being a minor, who met with an accident arising out of and in the course of his employment before the Act of 1926 came into force is, if he was still under twenty-one years of age when the Act came into force, entitled to obtain a review during the extended period permitted by the amending Act.

A workman under twenty-one years of age met with an accident on August 4, 1926, and was paid compensation of 18*s*. 7*d*. a week until March 24, 1927, when he was given light work at 14*s*. a week and paid 8*s*. 1*d*. a week compensation. On April 19, 1927, the workman came of age. After negotiations with regard to redemption of the employers' liability, the workman's father wrote to the employers on August 8, 1927, saying that as his son's present wage was very insufficient to maintain him and their offer of 700*l*. was insufficient, he was going " to put it into Court to ask the compensation justice to grant my son a living wage for life." Thereupon the employers made an increased payment of 27*s*. 6*d*. a week. On January 9, 1928, the employers commenced proceedings for redemption and claimed to redeem on the basis of the weekly payment of 18*s*. 7*d*. At the hearing the employers admitted that the workman was totally and permanently incapacitated and could never earn a penny. The county court judge made an award for redemption of the weekly payment of 18*s*. 7*d*. a week.

On appeal :—

Held, (1.) that on the facts and having regard to the fact that the workman was admittedly totally and permanently incapacitated, there had been a review of the weekly payment by agreement when it was increased to 27*s.* 6*d.* a week; (2.) that the workman not having attained twenty-one years of age when the Act of 1926 came into force, was entitled to avail himself of the benefit of this review, as it was obtained within the extended time permitted by s. 11, sub-s. 2, as amended; and (3.) that the case must accordingly go back to the county court judge for him to deal with the application for redemption on the footing that there had been this review.

APPEAL from an award of the judge of the Cardiff County Court sitting as arbitrator under the Workmen's Compensation Act, 1925.

William C. H. Kays was employed as a machine operator by Edward Curran & Co., and on August 4, 1926, when he was twenty years old he met with an accident arising out of and in the course of his employment. As a result of the accident, when both his hands were caught by the knife of a guillotine machine, he lost all the fingers of both hands and was totally incapacitated. The workman was then in receipt of wages of 24*s.* 8*d.* a week and was paid compensation of 18*s.* 7*d.* a week down to March 24, 1927. He was then given light work and received wages of 14*s.* a week and 8*s.* 1*d.* a week compensation.

On April 19, 1927, the workman became twenty-one years of age, and thereafter negotiations commenced in regard to the redemption of the employers' liability to pay compensation. On August 8, 1927, the workman's father wrote to the employers: "I am writing to you to know if there has been any further developments in my son's claim of 1000*l.* for compensation, as you promised me at our last interview that you were going to send to your head claims man and that you would let me know the result. I must say that they are a very long time in considering the case, and as my son's present wage is very insufficient to maintain him and the offer of 700*l.* which you offered to pay was insufficient, I am therefore going to put it into Court to ask the compensation justice to grant my son a living wage for life, as this is the legal advice that has been given to me, and as my son is not in his proper health since, I shall have to take that advice."

The employers thereupon commenced to pay the workman 27*s.* 6*d.* a week, the first payment at this rate being made on August 12, 1927. On November 28, 1927, the employers' solicitors wrote to the workman to say that they had received instructions "to apply to the Court under s. 13 of the Workmen's Compensation Act, 1925, to redeem any further weekly payments of compensation to which you may be entitled under the said Act." They then set out s. 13 of the Act and continued: "In your case the weekly payment has been continued for not less than six months inasmuch as 18*s.* 7*d.* per week compensation was paid you from on or about the 4th August, 1926, to on or about the 24th March, 1927, upon which date you commenced work at 14*s.* per week, receiving compensation at the rate of 8*s.* 1*d.* per week until the 12th August, 1927, when your wages increased to 27*s.* 6*d.* per week, an amount in excess of your pre-accident earnings of 24*s.* 8*d.* per week. Our clients have instructed us to offer you in settlement and redemption of any claim which you may have to be paid compensation in the future, the amount necessary to redeem calculating the amount upon the basis of the maximum compensation to which you could be entitled, viz., 18*s.* 7*d.* per week which amount we estimate to be 710*l.* 8*s.* say 711*l.*"

This offer was not accepted, and on January 9, 1928, the employers commenced proceedings for redemption. By his answer the workman set up the contention that the weekly payments to him were reviewed on August 12, 1927, and that by agreement he was thereafter employed by the employers at light work and receiving the weekly payment of 27*s.* 6*d.* He also contended that the employers were not entitled to redeem.

It appeared from the county court judge's note that at the hearing before him counsel for the employers admitted that the workman was totally and permanently incapacitated and said: "I am prepared to admit that for all time he is not able to earn a penny."

For the employers evidence was given by J. H. Kitson, the employers' works manager, that on August 4, 1928, the

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workman's wages were raised to 27*s*. 6*d*. a week. His father complained that the money received was not quite sufficient to keep his son and so the advance was given. The workman was at first a night worker. He also said: "There is no prospect of his having any other kind of work. If he had not met with this accident, he would only have developed into a labourer. He would not have earned any more. It is very probable we should have to get rid of him. He could not be employed in the office. You could not call him sharp." Cross-examined, he said that the workman "would not have earned as much as 2*l*., but probably 27*s*. 6*d*."

The county court judge held that the employers were entitled to redeem the weekly payment of 18*s*. 7*d*. and he awarded a lump sum of 724*l*. 6*s*. 6*d*.

The workman appealed.

Trevor Hunter K.C. and *Matabele Davies* for the appellant. When an infant receives compensation in respect of injury by accident, he has a right as he grows older to apply for a review and to have his weekly compensation increased to such an amount as would have been awarded, if he had at the date of the accident been earning what he would probably have been earning at the date of the review, if he had remained uninjured. This is provided by the Workmen's Compensation Act, 1925, s. 11, sub-s. 2, but that sub-section as amended by the Workmen's Compensation Act, 1926, s. 1, provides that the application for a review must be made "before or within six months after the workman attains the age of 21 years." Here the workman's father notified his intention of applying in his letter of August 8, 1927. The employers met that by increasing his so-called wages to 27*s*. 6*d*. a week. The result was that there was no application for a review; and then after waiting till the expiry of six months after the workman has attained twenty-one, so that he can no longer apply for a review, they seek under s. 13 to redeem their liability to compensation on the basis of the compensation of 18*s*. 7*d*. paid to him when he first met with the accident. They have obtained an award for redemption on that basis. If this award was to stand, it would show that a ready means is available of depriving an infant suffering from total incapacity of his full rights. It is submitted that there was a review of the compensation when the employers increased his weekly payments to 27*s.* 6*d.* If not, then as the employers prevented the workman from fulfilling his intention of going to the Court by giving him increased wages or compensation, they should be estopped from saying that there was not a review. If there was a review the application for redemption should fail as 27*s.* 6*d.* had not been paid to the workman for six months and it is made a condition of an application to redeem that the weekly payment should have been continued for not less than six months.

In any case there was no right to redeem the payment of 18*s.* 7*d.* It was not what the workman was in receipt of at the time of the application to redeem. Moreover the sum actually paid at any moment for compensation is not the test of what is to be redeemed: *Clawley* v. *Carlton Main Colliery Co.* (1)

A. T. James K.C. and *Godfrey Parsons* for the respondents. On the question whether the weekly payment could be redeemed, it is to be noted that s. 13 does not provide that the weekly payment of compensation must continue down to the date of the application to redeem. The redemption is of the employers' liability under the Act: *Clawley* v. *Carlton Main Colliery Co.* (1) So, too, there can be a review, although the workman is on full wages and no weekly payment is being made: *Wolseley Motors* v. *Sharp.* (2) It makes no difference whether or not compensation has been the subject of a recorded agreement: *Guest, Keen and Nettlefolds, Ld.* v. *Williams.* (3)

Here there was an agreement to pay 18*s.* 7*d.* a week and, although the workman could, as he was an infant, have applied for a review, he never did so and is now debarred from doing so. He can never get more than 18*s.* 7*d.* a week

(1) [1918] A. C. 744.
(2) (1925) 18 B. W. C. C. 15.
(3) (1925) 18 B. W. C. C. 68, 77.

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and he was in receipt of it for more than six months. Therefore the right to redeem on that footing arises. Again, it cannot properly be said that there was a review in August, 1927; no doubt there can be a review by agreement, but here all that happened was that the employers incurred the wages the workman was receiving for his light work. The result of this increase was that he ceased to receive any compensation. It is submitted that there is no possible ground for saying that there was a review of the compensation payable. The finding of the county court judge is impliedly against a review. He finds too as a fact that the workman would never have earned sufficient to entitle him to more than 18*s.* 7*d.* a week compensation. There is no evidence from which the Court can draw the inference that there was a review: compare *Williams* v. *Vauxhall Colliery Co.* (1)

Again, the right of the workman to a review expired when he attained twenty-one years of age and did not last for a further six months. Under the Workmen's Compensation Act, 1925, s. 11, sub-s. 2, the review had to be made " before the workman attains the age of 21 years." It was the Workmen's Compensation Act, 1926, s. 1, that substituted for the words " and before the workman attains the age of 21 years," the words " and the application for the review is made before or within six months after the workman attains the age of 21 years." The Act of 1926 only came into force on December 15, 1926, and the accident was on August 4, 1926. The amending section therefore does not apply, and even if there was what might have amounted to a review by agreement in August, 1927, it was too late. The amending Act cannot be treated as interfering with existing rights, unless the Act itself so provides in terms: *Moakes* v. *Blackwell Colliery Co.* (2); *Clement* v. *D. Davis & Sons, Ld.* (3)

[LORD HANWORTH M.R. May it not be said that the amending section deals with procedure only? Such Acts take effect at once.]

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(1) [1907] 2 K. B. 433.
(2) [1925] 2 K. B. 64.
(3) [1927] A. C. 126, 131, 133.

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The effect of the amendment is not limited to procedure. It affects rights. There are employments in which the rate of wages goes up after twenty-one, and in such a case the effect of the amendment would be to entitle the infant workman to compensation at a higher rate.

[They also referred to *Calico Printers' Association* v. *Higham* (1) and *Edwards* v. *Alyn Steel Tinplate Co.* (2)]

Trevor Hunter K.C. in reply. At the date when the Workmen's Compensation Act, 1926, came into force the workman was still under twenty-one years of age, so that he had not then lost his right to a review under the 1925 Act. Further s. 1 of the Act of 1926 took the form of substituting new words for existing words in s. 11, sub-s. 2, of the 1925 Act. Therefore as from that date s. 11, sub-s. 2, read as altered; and the infant could thereafter only exercise his rights under the sub-section as altered. The old sub-section was destroyed. A review in August, 1927, would therefore be in time, and on the facts there was such a review. The man was totally incapacitated, and although the 27*s.* 6*d.* he was receiving was called wages, it was really compensation. If it was not compensation, it must have been a charitable gift; but the inference is irresistible that a payment made as a result of a threat to apply for increased compensation is compensation. There is some difficulty in saying that redemption could be ordered if this view be correct, as the payment of 27*s.* 6*d.* had not continued for six months.

LORD HANWORTH M.R. This is an appeal from an award made by the learned county court judge upon a redemption, and it involves a number of difficult points upon which we have received much assistance from both Mr. Trevor Hunter and Mr. James.

The facts are of the simplest but saddest kind. [His Lordship then stated the facts and read the letters set out above:] The county court judge found as follows: "It was proved or admitted: (1.) that the workman was under twenty-one at the date of the accident; (2.) that the maximum

(1) [1912] 1 K. B. 93. (2) (1910) 3 B. W. C. C. 141.

amount then payable was 18*s.* 7*d.*; (3.) that the payment of 18*s.* 7*d.* was continued for not less than six months; (4.) that the workman is now over twenty-one"; so that it is plain that he makes his estimate of the sum payable on redemption on the basis of the weekly payment of 18*s.* 7*d.*, and disregards facts which, to my mind, are of importance. The learned county court judge's note shows that at the hearing an admission was made by counsel for the employers, who said: "I admit workman totally and permanently incapacitated. I am prepared to admit that for all time he is not able to earn a penny." True it is that the man was given some occupation; at one time he started pushing plates about in trucks, and then he complained that the work was too heavy for him. He was then given a job as messenger in the works, and he acted as an errand boy for the timekeeper. All these were attempts, legitimate and good attempts, on the part of the employers to meet the difficulty of this poor fellow who had been rendered absolutely unemployable and utterly unable to earn a single penny; he was totally and permanently incapacitated from making any earnings at all. Some occupation was found for him, but it appears to me upon that admission that he was not able to earn a penny. He is totally and permanently incapacitated, and to talk of his "wages" is really a misnomer. He had occupation, yes, but work, no, and the employers gave him the opportunity of being occupied so as to prevent the misery of his condition acting upon him. During the whole of that time the payments which they were making to him were to a man who had suffered a serious accident in their employ, and they were made because of their liability to him under the Workmen's Compensation Act.

Equally, I think, another fact has been overlooked by the learned county court judge. What was written and demanded in August was that the employers should increase the weekly payments to the man now that he had become of age and should pay him a better so-called wage; but again that wage is nothing more than compensation. The employers responded by increasing the amount from and after August 12 to 27*s.* 6*d.* That sum was paid by way of compensation on the demand made by the young man's father, who made it quite clear that if a response was not made increasing the sum he would go to Court.

Was that or was it not a review? It is not for us to find the facts, but it appears to me that the only conclusion which is possible upon those facts is that this was a review. If there had not been a review made by agreement, the case would have gone into Court and would have been dealt with. It must be remembered that by s. 21 of the Act there is power to settle cases by agreement; and it is only if agreement fails that arbitration is to be the mode of procedure. The section provides that "the question, if not settled by agreement, shall, subject to the provisions of this Act, be settled by arbitration." After the letter and the response by the employers, it is plain (and I think the only possible inference from the facts) that there was an agreement; there was a review by agreement fixing the compensation to be paid, call it what you will, at 27*s.* 6*d.* a week. The appellant rightly says that the judgment of the county court judge shows that he has neglected the factor of that review and the payments of 27*s.* 6*d.* a week, and has based his award upon the weekly payment of 18*s.* 7*d.* alone.

Another point to be dealt with is whether that review can be made available to the workman. Sect. 11, sub-s. 2, of the Act is in these words: "Where the workman was at the date of the accident under twenty-one years of age and the review takes place more than six months after the accident and the application for the review is made before or within six months after the workman attains the age of twenty-one years, the amount of the weekly payments may be increased. . . . ." It is said on behalf of the workman that the application for a review was made within six months after the workman attained the age of twenty-one, because the application was made on August 8, 1927, which was less than six months after April 19, 1927, when the young man became of age. But Mr. James points out that the words, "and the application for the review is made before or within six months

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after the workman attains the age of twenty-one years," were introduced into s. 11, sub-s. 2, of the Act of 1925, by the Workmen's Compensation Act, 1926, which received the royal assent on December 15 of that year, and not before; and he says that inasmuch as the accident took place on August 4, 1926, the amendment to s. 11, sub-s. 2, effected by the Act of 1926 cannot be referred to for the purpose of enabling the workman to bring into account facts which took place within six months after he attained the age of twenty-one years, for as s. 11, sub-s. 2, stood when the accident happened, the sub-section contained instead of those words the words "and before the workman attains the age of twenty-one years." It is plain law that you cannot presume that legislation is retrospective so as to alter the rights of parties. The passages which have been referred to in the case of *Clement* v. *D. Davis & Sons, Ld.* (1), in the speeches of Viscount Dunedin and Lord Sumner must be closely and carefully observed and followed; but it has been pointed out in reply that in the present case the effect of the Act is to alter words in the earlier Act by substituting others for them. So that from and after the passing of the later Act the section reads in the way in which I have read it.

Can it be said that that amendment ought not to affect the present case, and, if it is taken to affect it, does it alter rights retrospectively? The answer given by Mr. Trevor Hunter—and I think it is a good one—is that the young man was still under twenty-one years of age when the Act of 1926 came into force and that the purpose of the statute in regard to persons who were under twenty-one years of age was to alter the time within which they were to have an opportunity of obtaining a review. It appears to me that the Act was intended to modify the position and the relation, and, indeed, the rights of parties, but that, quite apart from that, it effected an alteration of the time limit within which a young man then under twenty-one years of age could apply for a review. It is an Act, therefore, which to my mind does apply to the present case. For these

(1) [1927] A. C. 126.

reasons the review which took place in August, 1927, can be relied upon, and is an important fact in the case.

Summarizing the position, therefore, it comes to this. There was a review fulfilling the conditions laid down in s. 11, sub-s. 2, as amended; and by virtue of that review at the time when the redemption was asked for the workman was in receipt of a weekly payment of 27*s.* 6*d.*, which, call it what you will, weekly payment, wages, or anything else, was a payment made by the employers in respect of their liabilities under the Act to a person whose rights had been asserted and would have been insisted upon, if they had not agreed to pay 27*s.* 6*d.*

The redemption section is s. 13, which provides: "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed." Now was there a weekly payment? It has been pointed out that what is redeemed is the liability for the weekly payments and that in the present case total incapacity is admitted. In *Wolseley Motors* v. *Sharp* (1) I said that the redemption could proceed if there was a liability for compensation, although that liability was cloaked by the payment of wages; and Scrutton L.J. in *Guest, Keen & Nettlefolds, Ld.* v. *Williams* (2) said: "But the proper way of regarding this matter, it appears to me, is that it is not really an arbitration to fix original liabilities; it is an application to review payments which have been made under an unrecorded agreement, an unrecorded agreement for this purpose being valid and effectual. If that is the way in which the case has to be approached, then what the employer is saying is: 'I can apply to review payments under an unrecorded agreement because I made a mistake of law at the time I made the agreement.'" I need not read on, but the effect of the passage is that there can be an application for redemption, even though at the moment a "weekly payment," in the true sense of the words, is not being made, but there is only a subsisting liability to make them. Further, the redemption

(1) 18 B. W. C. C. 15.

(2) 18 B. W. C. C. 68, 78.

must be of the full amount. That is laid down in *Clawley* v. *Carlton Main Colliery Co.* (1), where Lord Finlay said: "The true measure of compensation in such a case is the weekly payment plus so much of the benefits or advantages conceded by the employer as will make up the difference between the statutory liability and the agreed weekly payment, and to cancel the whole liability by redemption of a part only would result in the workman being deprived of a part of the compensation to which he is entitled." So that if there is to be a redemption the whole amount has to be redeemed, and redemption must be on the basis of what the man was receiving under the review. As Fletcher Moulton L.J. points out in *Calico Printers' Association* v. *Higham* (2) the weekly payment is "a weekly payment of a certain constant amount"; and where the incapacity is permanent the weekly payment will probably not vary in the future.

The redemption, therefore, must be on the basis of a permanent payment which, in the case of total incapacity, will not vary in the future. There has been in this case a review under which 27*s.* 6*d.* a week is being paid. Having regard to the fact that the man is admittedly unable to earn a penny, that sum must be permanent, and the redemption would have to be, it would seem, upon that basis. There may, however, be a question whether or not the 27*s.* 6*d.* or something representing it has been paid for six months, so as to entitle the employers to redeem at all. Having regard, however, to the fact that the learned county court judge has considered the matter without taking into account the review in August, 1927, and the weekly payment of 27*s.* 6*d.*, the right course appears to me to be to send this case back to the county court judge for him to deal with it. He will then be able to determine what is the right amount at which the liability for compensation can be redeemed after taking into account the review and the payment of 27*s.* 6*d.* a week, if he comes to the conclusion that there has been a weekly payment which entitles the employers to redeem under

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(1) [1918] A. C. 744, 750; 11 B. W. C. C. 440, 444. (2) [1912] 1 K. B. 93.

s. 13, that is to say, a weekly payment continued for not less than six months. That question I desire to leave open, but the other matters to which I have referred must be brought to the learned judge's attention, and he will then be able to determine the right figure at which the redemption sum must stand.

The result is that the appeal will be allowed with costs and the award set aside with costs, and the case will go back for the county court judge to deal with after considering the judgment which we have given.

SANKEY L.J. I agree. I desire first to follow my Lord in expressing my obligations to the learned counsel, Mr. Trevor Hunter and Mr. James, for the assistance which they have given to the Court.

I do not want to repeat the facts which have been already referred to by my Lord, but I should like to state my view of the law under three heads: (1.) Was there a right to review? (2.) If so, upon what basis? (3.) Does the Act of 1926 apply to the present case? As to the first question whether there was a right to review, that depends upon the application of s. 13 to the facts of the case. Sect. 13 provides: "Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed." The difficulty, in my view, arises upon the words "liability therefor." What does the section mean? Does it mean that the liability for that particular weekly payment may be redeemed, in which case certain automatic rules would apply and it would hardly be necessary to go to the Court at all, or does it mean that the liability under this Act may be redeemed? I think it means the latter and that, "Where any weekly payment has been continued for not less than six months, the liability therefor"—that is the liability for payment during the incapacity of an amount calculated in accordance with the rules under s. 9—"may be redeemed." I think that is the result of the cases. I doubt if it is the grammatical result, but I think you are driven to that result by a consideration of cases where there is recurrent incapacity. Take, for example, the case where a workman has been injured and returns to work with an award of 5*s*. a week; subsequently he becomes ill again and the award is increased upon a review to 15*s*. a week because he is not able to earn the same amount of wages. After that 15*s*. has been paid for over six months, as, by the hypothesis, the 5*s*. was paid, the workman again gets better; the award is reviewed and there is a new award for 2*s*. 6*d*. a week paid for over six months. There there are three weekly sums which have been paid for over a period of six months—namely, the 5*s*., the 15*s*., and the 2*s*. 6*d*. Merely on those facts I cannot think it would be right under the Act for the employer to be given a right to redeem the weekly payment of 2*s*. 6*d*. It might be capable of proof that the 2*s*. 6*d*. in the case I have put was the maximum amount which the workman would ever be likely to be entitled to, but I think that is a matter which the county court judge would have to consider. As Viscount Haldane says in *Clawley's* case (1): "The Act read as a whole plainly signifies that the workman is to have the full compensation contemplated by the initial part of the schedule. No doubt it assumes that a weekly payment may form an element in this compensation," and then a little further on he says: "Reading the statute as a whole I think that the expression in para. 17 'liability therefor,' must mean a liability to the actual amount paid weekly only in cases where the amount of the weekly payment covers the liability." In the case which I put the 2*s*. 6*d*. does not necessarily cover the amount of the liability in cases of recurrent incapacity. Indeed in *Clawley's* case (1) the learned county court judge endeavoured to remedy any possible injustice by granting a declaration of liability to cover circumstances of that sort. Therefore, I come to the conclusion here that there was a right to redeem because the condition precedent of a weekly payment for not less than six months had been performed.

With regard to the basis upon which the redemption could

(1) [1918] A. C. 744, 755; 11 B. W. C. C. 440, 450.

take place, I think, for the reasons given by my Lord, that there was a review of the weekly payment in August, 1927. I do not go into those reasons again. I think that the learned county court judge has not taken into consideration that element of the case. He has only taken into consideration the original weekly payment of 18*s.* 7*d.* and automatically applied the table to that figure, and he has not taken into consideration this review under which 27*s.* 6*d.* was paid. I do not want, for one moment, to fetter his discretion in arriving at the true amount payable, but because he has not taken into consideration what appears to me to be a vital element I think the matter should, in justice to the workman, go back to him and he should consider it upon the proper basis, one element of which is this payment of 27*s.* 6*d.* He will be able to hear evidence with regard to that and come to a proper determination, having regard to s. 11, which lays down the basis upon which a review of weekly payments may take place.

The last question of all is, Does the Act of 1926 apply to this case? Sect. 11, sub-s. 2, of the old Act of 1925 provided: "Where the workman was at the date of the accident under twenty-one years of age and the review takes place more than six months after the accident and before the workman attains the age of twenty-one years, the amount of the weekly payment may be increased." But an Act was passed in 1926 which altered that sub-section. The Act of 1926 provided that "in sub-section (2) of section 11 of the Workmen's Compensation Act, 1925, ... for the words 'and before the workman attains the age of twenty-one years' there shall be substituted the words 'and the application for the review is made before or within six months after the workman attains the age of twenty-one years.'" I should agree with Mr. James' argument that in many cases—I think in all cases—vested rights cannot be altered by a subsequent Act of Parliament, unless there is an express enactment to that effect. But just consider for a moment whether that principle applies here. This Act of 1926 came into force on December 15, 1926, some four months before the workman came of age and some eight months before the review was made in the circumstances which the Master of the Rolls has already explained. What was the position on the day after the Act was passed? On that day the old words of sub-s. 2 of s. 11 of the Act of 1925 had been altered, and if you had written out that section of the Act of Parliament on December 16, 1926, it would have read as follows: " Where the workman was at the date of the accident under twenty-one years of age and the review takes place more than six months after the accident and the application for the review is made before or within six months after the workman attains the age of twenty-one years, the amount of the weekly payment may be increased to such an amount. . . ." Therefore, on December 16 the sub-section which applied was the sub-section altered as I have read it; and I, therefore, do not think that Mr. James is right in suggesting that the appellant cannot take advantage of the Act of 1926. What happened was that on and after December 15, 1926, the sub-section of the 1925 Act as originally framed disappeared, and the altered sub-section was in force from and after that date. Therefore, I am of opinion that that point made by Mr. James is not a sound one.

On all these grounds I think that the award was incorrect and that it should be remitted to the learned county court judge for him to consider it upon a proper basis. I agree that the appeal should be allowed with costs.

RUSSELL L.J. I am of the same opinion. I only desire to add something upon the second point to which Sankey L.J. has referred—namely, the basis upon which the redemption should take place. In my opinion the letter written by the father on August 8, in which he threatens to go to the Court in order, as he says, " to ask the compensation justice to grant my son a living wage for life," can only have been understood by the employers to mean that he was threatening to go to the Court to get the amount of compensation payable under the Act increased beyond the then existing sum. The only answer to that letter was to increase

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the payments to the young man to 27*s.* 6*d.* a week. In my opinion that amounts to a review by agreement within the meaning of s. 11 of the Act. The result is that the decision of the learned county court judge cannot stand because that is based solely upon the footing that the compensation payable was 18*s.* 7*d.* He has not in any way taken into consideration the fact that by agreement the amount was reviewed in August, 1927, and that the amount arrived at then was 27*s.* 6*d.*

In my opinion, therefore, the case should go back to him to be dealt with upon the footing that the 18*s.* 7*d.* a week had by agreement been increased on review to 27*s.* 6*d.* a week in August, 1927.

I confess to a feeling of gladness that this is the result, as otherwise a grave injustice might have been done to this workman, because the position seems to be that in August, 1927, there were negotiations for the redemption by payment of the lump sum of 700*l.* The father said: "I will not accept that; I will go to the Court." His application to the Court is stopped by the increased payment of 27*s.* 6*d.* a week, and then after the six months provided for in sub-s. 2 of s. 11, as amended by the Act of 1926, have run out, the employers, acting no doubt at the instigation of their insurance company, claim to redeem on the old footing of 18*s.* 7*d.* a week, and say: "You are too late for a review."

I agree with what has fallen from the Master of the Rolls and Sankey L.J. with regard to the other two points—namely, the right to review in this case and the effect of the amending Act of 1926. Upon those two points I desire to add nothing further.

Solicitors for the appellant: *Smith, Rundell, Dods & Bockett, for Evan Davies, Cardiff.*

Solicitors for the respondents: *Lewis Morgan, Browne & Haslam.*

H. C. G.

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EBNER *v.* LASCELLES.

Landlord and Tenant—Rent Restriction—Demised Premises, whether within the Acts—Non-occupation by Tenant—User only for Subletting—User for " business purposes "—Subletting at Rent including Use of Furniture —Action for Dilapidations—Defence—Transfer to Tenant of Burden— More onerous repairing Obligation—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 1 ; *s.* 2, *sub-s.* 3 ; *s.* 10 ; *s.* 12, *sub-s.* 2 (*i.*) (*ii.*) ; *s.* 14.

A dwelling-house consisting of a ground floor and basement, and being within the rental limits of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was let to a tenant under an agreement of tenancy containing a tenant's obligation to repair, the stringency of which was increased during the tenancy. The tenant did not herself occupy the dwelling-house or any part of it, but sublet the ground floor furnished, and the basement unfurnished, to sub-tenants whose occupation ceased shortly before the end of the tenancy. After the end of the tenancy the landlord brought an action against the tenant for breach by her of the obligation to repair. The tenant pleaded by way of defence that the increase in the stringency of that obligation constituted within the provisions of the Act a transfer to her of a burden or liability previously borne by the landlord, which should be deemed to be an increase of rent irrecoverable from her, and by way of counterclaim that she was entitled under the provisions of the Act to recovery from the landlord of a sum that had been paid by her as rent in excess of the standard rent :—

Held, that the Act was not prevented from applying to the dwelling-house, so as to entitle the tenant to rely upon these provisions, on any of the following grounds :—

(1.) That the tenant took and used the dwelling-house only for the purpose of subletting it, inasmuch as the taking and user of premises only for that purpose does not make them business premises to which the Act does not apply.

(2.) That the tenant did not herself occupy the dwelling-house, and that her sub-tenants ceased to occupy it before the end of the tenancy.

Hicks v. *Scarsdale Brewery Co.* [1924] W. N. 189 ; *Prout* v. *Hunter* [1924] 2 K. B. 736 ; and *Gidden* v. *Mills* [1925] 2 K. B. 713 distinguished.

(3.) That the tenant had sublet the ground floor furnished to sub-tenants who ceased to occupy it before the end of the tenancy.

Leslie & Co. v. *Cumming* [1926] 2 K. B. 417 observations applied.

APPEAL from Brighton County Court.

By an agreement dated March 25, 1915, Sir J. Bradford let to a tenant " all that residential flat, being the ground floor at Codrington House, Hampton Place, Brighton . . . . together with the two front rooms scullery yard and lavatory in the basement of the said premises" for three years from March 25, 1915, at the yearly rent of 82*l*. 10*s*. The agreement contained an obligation by the tenant to keep the interior of the said premises in good and tenantable repair and condition during the tenancy, reasonable use and fair wear and tear thereof, and damage by accidental fire and King's enemies excepted. The agreement also contained obligations by the tenant not to assign, underlet or part with the possession of the flat, except as a furnished flat for periods not exceeding six months each, without the written consent of the landlord, but consent not to be unreasonably withheld in the case of a respectable and responsible tenant; and not to carry on upon the premises any trade or business. The letting of the premises under that agreement was the first letting of them since August 4, 1914, and 82*l*. 10*s*. a year was therefore the standard rent. In December, 1916, Miss B. Lascelles, the defendant, acquired the residue of that term. By an agreement dated November 15, 1917, Sir J. Bradford let to the defendant the same premises for three years from March 25, 1918, at the yearly rent of 90*l*., and that agreement contained obligations by the tenant similar to those in the former agreement. Neither at any time before the date of the latter agreement nor at any subsequent time did the landlord serve upon the defendant any notice of his intention to increase the rent under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 3, sub-s. 2. By an agreement dated March 18, 1921, the same lessor let to the defendant the same premises for a term of three years certain from March 25, 1921, at the inclusive yearly rent of 130*l*., and for a further three years at the yearly rent of 150*l*., the defendant to have the option of determining the tenancy on March 25, 1924, on giving three months' notice to the landlord at the end of the first three years; and that agreement contained obligations by the tenant similar to those contained in the previous agreements, except that the repairing obligation by the tenant differed from that in the previous agreements in that it omitted the exception of reasonable use and fair wear and tear. In April, 1922, Sir J. Bradford sold and conveyed the house to Mr. Ebner, the plaintiff. The defendant did not exercise her option to determine the tenancy, which accordingly continued until March 25, 1927. The defendant did not during her tenancy, except for a very short period, occupy the premises or any part thereof herself. From time to time she sublet the ground floor furnished, and the basement unfurnished, to sub-tenants for habitation. A week or two before the defendant's tenancy terminated her sub-tenants left the premises, and from the time of their leaving up to the end of her tenancy the demised premises were unoccupied. When the contract of tenancy ended the plaintiff took possession of the vacant premises. He thereupon caused them to be surveyed, when they were found to be to some extent out of repair.

In June, 1927, the plaintiff brought this action against the defendant in the county court for damages for alleged breaches by the defendant of her repairing obligation under the agreement of March 18, 1921, the sum claimed being 91*l.*

The defendant said by way of defence that as the obligation to repair in the agreement of 1921 omitted the exception of reasonable use and fair wear and tear which had been contained in the earlier agreements, it was a transfer to her of a burden or liability previously borne by the plaintiff under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 2, sub-s. 3, upon which the plaintiff's claim could not properly be brought, and that if she was liable for any breach of her obligation to repair the sum of 20*l.* which she brought into Court was more than sufficient to satisfy the same; and by way of counterclaim that the standard rent of the premises under the Act was 82*l.* 10*s.*, in respect of which no notice of increase had been served under the Act, and that she was entitled to the return of 33*l.* 15*s.* paid by her in excess of the authorized rent for the last two quarters of her term.

The plaintiff contended that the Act did not apply to the demised premises on grounds which appear below from the judgments of the county court judge and of the Divisional Court.

At the trial of the action the defendant stated in evidence that she took the premises for the express purpose of subletting them; and that she sublet the ground floor furnished, and the basement till July, 1919, furnished, but since that time unfurnished.

The county court judge was of opinion that the Act did not apply to the premises or any part of them on the ground that, having been taken and used by the defendant for the sole purpose of subletting, they had been taken and used for business purposes, and on the further ground that the defendant herself had never been in substantial occupation of them, and he accordingly held that the repairing obligation in the agreement of 1921 applied to the whole of the premises, and that the plaintiff was entitled to recover in respect of the whole of the premises for damage resulting from breach by the defendant of that obligation; and he was further of opinion that, if he should be wrong in the view that on these grounds the Act did not apply to any part of the premises, at all events it did not apply to the ground floor, as that had been during the whole of the defendant's tenancy sublet furnished, and accordingly that in any case the obligation in the agreement of 1921 applied to the ground floor and the plaintiff was entitled to recover in respect of that floor for damage resulting from breach by the defendant of that obligation, and in respect of the basement for damage resulting from breach of the obligation in the earlier agreements. He therefore gave judgment for the plaintiff for such damage as he had sustained in respect of the whole of the premises through breach by the defendant of the repairing obligation in the agreement of 1921, and directed that it should be referred to a surveyor to report as to the amount of the damage.

The defendant appealed.

Alexander Cairns for the defendant, appellant. The county court judge was wrong in holding that the defendant was liable for dilapidations to the full extent of the repairing obligation in the tenancy agreement of 1921, omitting, as it did, the exception of reasonable use and fair wear and tear which had been contained in the repairing obligation in the earlier agreements; and that she was not entitled under her counterclaim to recover back from the plaintiff the sum of 33*l*. 15*s*., the amount by which the rent paid by her exceeded the standard rent for two quarters, or part of that sum. If the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied to the demised premises, then the increase in the stringency of the original repairing obligation by the omission of the exception was, within the meaning of s. 2, sub-s. 3, of the Act, a transfer to the defendant as tenant of a burden or liability previously borne by the landlord which should be deemed to be an increase of rent irrecoverable from the tenant; and the sum paid by the defendant in excess of the standard rent is under s. 14 of the Act recoverable by the defendant from the plaintiff. The Act was not prevented from applying to the premises on the ground that the plaintiff's taking and user of them for the purpose of subletting them made them business premises to which the Act does not apply. A person, or at all events an individual as distinct from a company, who acquires or holds leasehold property for the purpose of subletting parts of it, does not by doing so carry on a business or render the premises business premises: see per Jessel M.R. in *Smith* v. *Anderson*. (1) The possession of the demised premises which is contemplated by the Act is not a possession personal to the tenant, but a possession of the " res " which the tenant may to some extent transmit to other persons. It clearly appears from s. 5, sub-s. 5, and s. 15, sub-s. 3, that the subletting of premises otherwise within the Act does not take them out of the Act; and that implies that the subletting of them does not convert them into business premises. Neither was the Act prevented from applying to the demised premises on the ground that the defendant was not herself in occupation of them, or that her sub-tenants had ceased to occupy them before the termination of the tenancy. The cases of *Hicks* v. *Scarsdale Brewery Co.* (2); *Prout* v. *Hunter* (3); *Gidden* v. *Mills* (4); and

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(1) (1880) 15 Ch. D. 247, 260.
(2) [1924] W. N. 189.
(3) [1924] 2 K. B. 736.
(4) [1925] 2 K. B. 713.

Martin Estates Co. v. *Watt & Hunter* (1) have no application to the present case. These cases only decide that the Act does not protect the tenant against a claim by the landlord for possession at the termination of the tenancy by entitling him to hold over as a statutory tenant, unless he is in occupation of the premises at the end of the term: they do not decide that the tenant is not entitled to the protection of the Act in respect of matters, such as breaches of covenant, which occur during the contractual tenancy. Nor is the Act prevented from applying to the whole of the premises, including the ground floor, by reason of the ground floor having been let furnished. It is true that s. 12, sub-s. 2 (i.), provides that the Act shall not apply to a dwelling-house let at a rent which includes payments in respect of the use of furniture; but that provision was amended by s. 10 of the Rent, &c., Restrictions, Act, 1923, which shows that a dwelling-house may be deemed to be let at a rent which includes payments in respect of the use of furniture, if the amount of rent attributable to the use of the furniture forms a substantial portion of the whole rent. In *Leslie & Co.* v. *Cumming* (2) it was held that a landlord who claimed possession of the whole of the premises was not entitled to rely upon the subletting of a portion of the premises furnished for a period which has expired. It seems to have been there suggested that if the landlord had claimed possession of the furnished portion of the premises only he might have succeeded, but there the statutory tenant was again in occupation of the premises before the termination of the tenancy.

J. G. Hurst K.C. and *John Flowers* for the plaintiff, respondent. The judgment of the county court judge was right in all respects.

The Increase of Rent, &c. (Restrictions), Act, 1920, did not apply to the premises demised by the plaintiff to the defendant, inasmuch as they were business premises. The Act provided by s. 13 that it should apply to business premises subject to certain modifications, but that that section should continue in force only until June 4, 1921; so that that

(1) [1925] N. I. 79.

(2) [1926] 2 K. B. 417.

section brought business premises within the Act only for temporary purposes and for a very short period of time which had elapsed long before this action was brought. The Act by s. 13, sub-s. 2 (ii.), provides that the application of the Act to a house shall not be excluded by reason only that part of the premises is used for business purposes; and that proviso makes it clear that a house used entirely for business purposes is outside the Act. In the present case the defendant admitted in evidence that she took and used the premises in question not for the purpose of occupying them personally as a dwelling-house, but for the sole purpose of subletting them, and the county court judge has so found. The premises were let to and taken by her for the express purpose of enabling her to sublet them. It appears from the covenant against assigning in the agreement of 1921 that she could assign or underlet the flat furnished even without the consent of the landlord. To take and use premises for the purpose of subletting them at a profit is to take and use them for business purposes. The county court judge rightly held that these were business premises. Further, the Act did not apply to the premises in question because the defendant as tenant was never in substantial occupation of them. The cases of *Hicks* v. *Scarsdale Brewery Co.* (1); *Prout* v. *Hunter* (2); and *Gidden* v. *Mills* (3) show that, in order to entitle the tenant to the benefit of the Act, he must be in personal occupation. Here the county court judge has found as a fact that the defendant was never in substantial occupation of the premises, and there was evidence to support his finding. There is therefore no appeal against his decision on that point. Moreover, the Act did not apply to the premises in question because they were furnished premises. Sect. 12, sub-s. 2 (i.), of the Act provides that the Act shall not apply to a dwelling-house bona fide let at a rent which includes payments in respect of use of furniture. In that proviso the word "let" means let to the tenant in occupation, and therefore, where, as here, the owner of a house lets it unfurnished to a tenant,

(1) [1924] W. N. 189.

(2) [1924] 2 K. B. 736.

(3) [1925] 2 K. B. 713.

who lets it furnished to a sub-tenant, the tenant cannot claim the protection of the Act : *Prout* v. *Hunter*. (1) The premises in question consisting of the ground floor and basement were let to the defendant as one whole, and the defendant, by subletting the basement furnished, converted the whole into furnished premises to which the Act did not apply. At all events the defendant, by subletting the basement furnished, converted the basement into furnished premises to which the Act did not apply. It would appear from the decision in *Leslie & Co.* v. *Cumming* (2) that if in that case the whole of the premises had been let furnished and the landlord had claimed the whole, he could have relied upon the subletting furnished as taking the premises out of the Act. If on any of these contentions of the plaintiff the premises as a whole are outside the Act, then the defendant was bound by the repairing obligation in the agreement of 1921, and is liable for all breaches of that obligation committed by her, and she is not entitled to repayment of any of the rent paid by her to the plaintiff. If the plaintiff is not entitled to rely upon either of his two earlier contentions, but only upon his third contention—namely, that the Act does not apply to furnished premises—and is only entitled to rely upon that contention as regards the ground floor and not as regards the basement, then the defendant was bound by the repairing obligation of 1921 as regards the ground floor and by the repairing obligation in the earlier agreements as regards the basement, and she is not entitled to repayment of any of the rent paid by her in respect of the ground floor, but only to repayment of that part of the last two quarters' rent which was applicable to the basement, and the amount of the damages for which she is liable on the plaintiff's claim, and the sum, if any, which she is entitled to recover on her counterclaim must be estimated accordingly.

SALTER J. This appeal raises questions under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which are not altogether free from difficulty. The plaintiff,

(1) [1924] 2 K. B. 736.

(2) [1926] 2 K. B. 417.

who had let a dwelling-house to the defendant, brought the action against her to recover damages for dilapidations alleged to have resulted from breaches by the defendant of the repairing obligation in the agreement of tenancy. The defendant admitted liability for breach of an obligation to repair, but said that she was not liable to the whole extent of the obligation upon which the action was brought, inasmuch as it had been increased beyond the repairing obligation in the previous agreements between the plaintiff and herself, and therefore to the extent of the increase constituted a transfer from the landlord to herself of a burden previously borne by the landlord within the meaning of s. 2, sub-s. 3, and should to that extent be deemed to be irrecoverable from the defendant. She further set up a counterclaim for rent paid by her in excess of the standard rent. The questions which thereupon arose were whether the premises the subject of the tenancy were or were not a dwelling-house to which the Act applied, and whether, having regard to the sub-lettings of the dwelling-house which had been made by the defendant, each part of it was or was not a dwelling-house to which the Act applied, and whether she was under liability to repair, larger or smaller, in respect of each part.

The facts of the case may be shortly stated. [His Lordship stated the facts substantially as above set out, observing further that the omission from the repairing covenant in the agreement of 1921 of the exception of reasonable use and fair wear and tear made that covenant heavier for the defendant to her disadvantage and to the plaintiff's advantage than it had previously been, and that as the defendant's sub-tenants had left the dwelling-house before the contractual tenancy ended the tenancy was always a contractual tenancy and was never continued as a statutory tenancy; and he thereupon continued as follows:] The first point that was taken before the learned county court judge was that the Rent Restriction Acts did not apply to the premises let to the defendant because they were business premises. Business premises did not come within the purview of these Acts until 1920. The Act of that year brought them for a very short time within the scope of the Acts, s. 13 providing by sub-s. 1 that the Act shall apply to any premises used for business trade or professional purposes as it applies to a dwelling-house subject to certain modifications, and by sub-s. 3 that the section shall continue in force until June 24, 1921 only; so that after that date business premises ceased to be within the Acts. The expressions business, trade or professional purposes in regard to demised premises have reference to the actual use to which the premises are put. The question whether premises are used for these purposes is, I agree, a question of fact. If there is evidence to show that premises are used for these purposes then, no doubt, the Act does not apply to them. The learned judge applied his mind to the question whether the premises to which this case relates were used for business purposes, and he has found that they have been used for these purposes and that they are business premises. I am quite unable to see that these premises have in fact been used for business trade or professional purposes. I think it is not immaterial to refer in the first instance to the tenancy agreement in which the description of the premises in question is in these words: "All that residential flat being the ground floor flat . . . . together with the two front rooms scullery yard and lavatory in the basement of the said premises," and in which there is an obligation upon the tenant not to assign underlet or part with the possession of the flat except as a furnished flat for periods not exceeding six months each, and an obligation not to carry on upon the premises any trade or business. The flat is obviously let as a residential flat for habitation. Moreover, during the whole period of the defendant's tenancy it has been sublet in two parts, always for habitation only. I am quite unable to see any evidence on which the learned judge could find that these premises are premises used for business trade or professional purposes. The real question seems to me to arise under s. 12, sub-s. 2, which provides: "This Act shall apply to a house or a part of a house let as a separate dwelling." The word "house" there obviously applies to the structure, and this flat is clearly part of a house

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within the meaning of the sub-section. It is also clear from the agreement of tenancy that this flat is let as a residential flat on condition that no business is carried on there. The flat is thus "part of a house let as a separate dwelling" within the meaning of the sub-section, and the Act accordingly applies to it. I am therefore unable to agree with the learned judge in holding that the Act did not apply to the demised premises on the ground that the defendant used them otherwise than as a dwelling-house.

The next point taken was that the Rent Restriction Acts did not apply to this flat because the defendant herself was never in occupation of it. In substance that is admitted. Except for a very short period or very short periods she never was herself in occupation of the flat. During the last few weeks before the tenancy expired no one was in occupation of the flat because the defendant's sub-tenants had gone. The defendant was, of course, during the tenancy in possession of the whole flat, but she was not in occupation of it. In support of the contention that the Acts do not apply to the flat because the defendant was not substantially in occupation of it at any time during the tenancy, the cases of *Hicks* v. *Scarsdale Brewery Co.* (1); *Gidden* v. *Mills* (2); and *Prout* v. *Hunter* (3) were cited. Those cases were all cases of ejectment. In *Hicks* v. *Scarsdale Brewery Co.* (1) Rigby Swift J. held that a tenant might be entitled to hold over under the protection of the Acts after the expiration of the contractual tenancy, but must be in occupation when the tenancy ended. This particular right to hold over, which is given to tenants by these Acts, was described by Lush J. in the well known case of *Keeves* v. *Dean* (4) as a "status of irremovability," and the later authorities have, I think, substantially approved that view. One of the tenant's rights is a right to hold over at will against the landlord after the contractual term has ended. The right to hold over is, however, a right to remain in occupation, and if the tenant is not in occupation at the material time he loses the right. That, I understand to have

(1) [1924] W. N. 189.
(2) [1925] 2 K. B. 713.
(3) [1924] 2 K. B. 736.
(4) [1924] 1 K. B. 685.

been the decision in *Hicks* v. *Scarsdale Brewery Co.* (1) The cases of *Gidden* v. *Mills* (2) and *Prout* v. *Hunter* (3) were to the same effect, and I do not think that I need say anything further with regard to them.

It has been truly said that the main rights conceded to a tenant under these Acts are, first, a right to hold over or "status of irremovability," and, next, a right not to have his rent unduly raised. The right to hold over is a right that comes into existence after the expiration of the contractual tenancy. During the contractual tenancy the tenant, being in possession under the protection of his contract, has no need of the protection of the Act to enable him to retain possession, but during that tenancy the Act protects him in regard to rent by providing that, notwithstanding any other agreements which he may make with his landlord as to rent, he is not to be charged a higher rent than the law allows, and if he is charged a higher rent than that he can have it reduced. The right to hold over after the termination of the contractual tenancy, and the right to protection during the contractual tenancy are two rights which must be kept distinct from each other. Because a tenant who is not in occupation of the premises at the end of his contractual tenancy loses his right to hold over, it does not at all follow that he cannot have the benefit of the protection of the Act during the period of the contractual tenancy. In this case, if the defendant had denied the plaintiff's right to possession of the premises and the plaintiff had claimed possession, it may be that he would have succeeded against her because she was not in occupation at the end of the contractual period, but to my mind it does not in the least follow that because she was not in occupation at the end of the contractual tenancy she is not entitled to the protection of the Act in regard to matters arising during the contractual tenancy, such as liability for rent and repairs.

The third point taken was that because part of this flat was let furnished by the defendant, therefore the Rent

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(1) [1924] W. N. 189.

(2) [1925] 2 K. B. 713.

(3) [1924] 2 K. B. 736.

Restriction Acts did not apply to the flat as a whole, or at any rate that they did not apply to the part let furnished. The authorities referred to on this point were *Prout* v. *Hunter* (1) and *Leslie & Co.* v. *Cumming* (2), which was also an ejectment case. In *Prout* v. *Hunter* (1) the tenant had sublet the whole of the premises furnished to a sub-tenant, and it was held that the landlord was entitled to eject her because she had taken the whole of the premises out of the Act by subletting them furnished. In *Leslie & Co.* v. *Cumming* (2) the tenant had sublet part of the premises furnished, and the Court held that the landlord was not entitled to an ordinary ejectment of the tenant from the whole of the premises, leaving open the question whether he might not have succeeded as to the part that had been sublet furnished. In the latter case there are observations of Roche and Mackinnon JJ. which must be cited in this connection. Roche J. there said, referring to s. 12, sub-s. 2 (i.), of the Act of 1920, "Then occurs the proviso as to furnished letting. The contention here is that the application of the Act to the whole of these demised premises is excluded by this proviso as to furnished letting. But the whole of these demised premises were not let furnished; only two rooms were so let. It may be that in accordance with the reasoning in *Gidden* v. *Mills* (3), which follows and applies *Prout* v. *Hunter* (1) and *Phillips* v. *Hallahan* (4), the plaintiffs, if they had claimed possession of the two rooms let to Mr. Samad, might have succeeded. It is, however, unnecessary to decide that point." (5) MacKinnon J. said: "As regards the previous letting to Mrs. Willcocks and Mr. Moore, whose occupation had come to an end long before proceedings had been taken in this action, I agree that the time at which one has to consider whether a dwelling-house is a dwelling-house subject to the protection of the Act, is the date of the writ or, in this case, the plaint in the county court. I do not suppose that Mr. Stone would have sought to argue that *Prout* v. *Hunter* (1) went as far as to apply in a case where the dwelling-house had been let furnished during the currency of the original lease, say in 1919 or 1920, but he does seek to say that a letting furnished for, I suppose, however short a period after the tenant became a statutory tenant took the house out of the category of a protected house and put it into the category of an unprotected house. It is only necessary to consider what startling results that contention would lead to in order to see that that argument must be wrong. For instance, if there be, as well there may be, a person in occupation of a house at Henley-on-Thames as what is called a statutory tenant, and supposing the owner of that house discovered that the statutory tenant let the premises furnished for the regatta week in 1922, could he now, by virtue of that use of the house for a week four years ago, come to the Court and say: Give me possession of the premises, because by virtue of that temporary subletting so long ago the premises ceased to be protected? I am far from saying that because you find that some contention under these Acts leads to an extraordinary result that therefore that cannot be the effect of the Act, because the Acts are so worded that extraordinary results of one kind and another do follow; but I think those considerations assist in leading one to the conclusion, with which I agree, that the fact that a house has been let furnished for a period which has expired before proceedings are commenced cannot be relied upon as taking the house out of the protection of the Act in the way which is suggested." (1) In the present case these proceedings were commenced after their tenancy had completely ended and the landlord had retaken possession of the premises. MacKinnon J. suggests that a letting or subletting even of the whole of the premises furnished which is finished and done with before action brought would not deprive the tenant of any rights, and a fortiori that the letting of a part would not have that effect. My view is that the letting of a part of this flat furnished by the defendant had no effect in taking this flat or any part of it out of the operation of the Act as regards the

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(1) [1924] 2 K. B. 736.

(2) [1926] 2 K. B. 417.

(3) [1925] 2 K. B. 713.

(4) [1925] 1 K. B. 756.

(5) [1926] 2 K. B. 417, 423.

(1) [1926] 2 K. B. 417, 424.

right of the defendant to claim its protection against any increase of her duty to repair.

The only other matter to be considered is the effect of the defendant's defence and counterclaim. In her defence the defendant says, and I think she is entitled to say, that the extension of the scope of the repairing covenant is, under the Act, equivalent to an increase of rent, and that to the extent of the increase it is irrecoverable from her by the plaintiff. By her counterclaim the defendant claims repayment of money which she alleges was paid by her to the plaintiff in excess of the authorized rent. As to that, it is common ground that the standard rent of the premises in question was 82*l.* 10*s.* a year, and that for six months before the action was brought she paid rent at the rate of 150*l.* a year, the difference for the six months being 33*l.* 15*s.* It was argued that the counterclaim ought not to apply to the ground floor which was let furnished, but only to the basement. I have already dealt with that contention and explained that in my view it is not sound.

I think, therefore, that the judgment of the learned judge should be set aside, and that judgment should be entered for the plaintiff upon the claim for such damages only as he may be found to have suffered, taking the repairing obligation in the tenancy agreement as including the clause excepting reasonable use and fair wear and tear, and for the defendant upon the counterclaim for 33*l.* 15*s.*, the amount paid by her in excess of the statutory rent.

In my opinion the appeal should to that extent be allowed.

CHARLES J. I agree in the conclusions which have been arrived at by my Lord, and will only add a very few words on one point. The learned county court judge in the course of his judgment said: "Where a tenant takes premises for the sole purpose of subletting the whole and never goes into occupation himself, the case is not protected by the Act. To say that he does so seems to me only to be saying in other words that the premises are business premises taken for business purposes." I would desire to say that these observations appear to me to involve a misconception of the true connotation of the expression "business purposes" as used in the Act. It is, I think, a misapprehension to suppose that to take a lease of premises only for the purpose of subletting them is to take a lease of them for business purposes so that they become business premises. No such meaning as that can be imported into these words of the Act, which must be understood to mean exactly what it says.

Appeal allowed.

Solicitors for appellant: *J. S. Blanckensee & Co.*
Solicitor for respondent: *R. Breach, Hove.*

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March 20, 29.

Executor—Promissory Note made by Executor and Others to Testator—Joint and several Obligation—Death of Testator—Right of Executor to sue Co-maker of Note—Discharge of Debt.

During the lifetime of a testator the executor named in his will and three other persons made a joint and several promissory note payable to him. After the death of the testator and probate of the will the executor brought an action on the promissory note against one of the other makers thereof:—

Held, that the action was not maintainable, inasmuch as the effect of the plaintiff's appointment as executor was at common law that the debt was discharged by release at the date of the death of the testator, and in equity that it was discharged by payment at the date of probate, so that in either case the debt had ceased to exist before the action was brought.

APPEAL from Swansea County Court.

The following statement of the facts of the case is taken from the written judgment of Salter J.:—

By his will dated February 24, 1912, Joseph Elliott appointed the plaintiff, Lewis Jenkins, to be his sole executor. On December 1, 1923, the plaintiff, the defendant, Isaac Jenkins, and two others made a promissory note by which they jointly and severally promised to pay Joseph Elliott the sum of 100*l*. Joseph Elliott died on March 18, 1924, and probate of his will was granted to the plaintiff on May 9, 1924.

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On August 15, 1927, the plaintiff began these proceedings in the county court, suing as executor and claiming on the promissory note. He obtained judgment, and the defendant appealed.

P. B. Morle for the defendant, appellant. The judgment of the county court judge in favour of the plaintiff should be set aside and judgment entered for the defendant. The plaintiff had no right to maintain this action against the defendant on the promissory note. The plaintiff, the defendant, and two other persons having made the promissory note jointly and severally in favour of the testator as payee, and the testator having appointed the plaintiff his executor and died, the debt for which the promissory note was given was extinguished and the liability not only of the plaintiff but of all the makers of the note, including the defendant, was completely discharged. The rule at common law is that an appointment by a testator of his debtor, whether a sole debtor or one of several joint or joint and several debtors, to be his executor, operates as a release or extinguishment of the debt; the principle being that a debt is merely a right of action, and as an executor could not maintain an action against himself, his appointment to that office suspended the personal action, so that it was gone and discharged: Williams on Executors, 11th ed., p. 1053. The appointment as executor of one of several joint and several debtors is equally a release of all: Byles on Bills, 18th ed., p. 234. Thus, if the obligee in a joint and several bond make one of several obligors his executor the right of action on the bond is discharged as against all the obligors: *Anon* (1); *Cheetham* v. *Ward*. (2) On the same principle, where the payee of a promissory note appoints the maker his executor, the debt is discharged and no action can be maintained on the note: *Freakley* v. *Fox* (3); and where he appoints one of several joint and several makers all the makers are alike released from liability. The rule in equity is that a debtor who is appointed executor by his

(1) (1482) Year Book, 21 Edw. 4, 81*b*; cited 1 Bos. & P. 630, 632n.

(2) (1797) 1 Bos. & P. 630.

(3) (1829) 9 B. & C. 130.

creditor and who proves the will is deemed to have paid the debt to himself as executor and to have the money in his possession as assets belonging to the testator's estate, so as to be accountable for the debt as assets: *Freakley* v. *Fox* (1), per Tenterden C.J. (2); *In re Bourne* (3); Williams on Executors, 11th ed., p. 1056.

Where accordingly, as here, the payee of a joint and several promissory note appoints one of the makers his executor, the debt is in equity taken to have been paid, and no action can be brought upon the note by or against any person. In the present case it is thus clear both at common law and in equity, that when the plaintiff became executor of the testator's will, the debt represented by the promissory note ceased to exist, and the plaintiff as executor could not maintain an action upon it against the defendant as one of the makers. The only actions that could be brought in respect of the debt would be either an action by a creditor of the testator for administration of his estate, or a personal action by the plaintiff or any other maker of the promissory note who had in fact paid the debt against the other makers for contribution. The case of *Beecham* v. *Smith* (4), which was relied upon in the Court below, is distinguishable from the present case. In that case the debt represented by the joint and several promissory note was not extinguished, and all that was decided was that an action could be maintained upon the note against one of the makers on his personal contract; but in the present case the debt has been extinguished and therefore no action is maintainable against the defendant as one of the makers of the note.

Roland Burrows, for the plaintiff, respondent. The plaintiff had a good cause of action against the defendant on the promissory note. Where the payee of a joint and several promissory note appoints one of the makers to be his executor, the latter is not prevented by the mere fact of his appointment as executor from maintaining an action on the note against any of the other makers. The rule of the common law, where

(1) (1829) 9 B. & C. 130.
(2) Ibid. 133.
(3) [1906] 1 Ch. 697.
(4) (1858) E. B. & E. 442.

a testator appointed his debtor, whether a sole debtor or one of joint and several debtors, to be his executor, was not that the appointment effected an immediate release or extinguishment of the debt, but that it effected only a postponement or suspension of the debt, which did not become an absolute release until it appeared that the rights of other persons would not be prejudiced. The appointment operated as an absolute release of the debt only in cases where there were assets sufficient to satisfy the creditors of the testator, for it would be unfair to defraud the creditors of their rights by a release which was merely voluntary: see Williams on Executors, 11th ed., p. 1054. Where the debt was joint or joint and several, until the release became absolute, all the debtors remained liable to be sued on the debt. Even if that rule of the common law continues to apply to other forms of debt or obligation, it no longer applies in the case of bills of exchange and promissory notes. The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), provides by s. 61 that where the acceptor of a bill of exchange becomes the holder of it after its maturity " in his own right " the bill is discharged; and by s. 89, sub-s. 1, that the provisions of the Act relating to bills of exchange apply, with the necessary modifications, to promissory notes. These provisions imply that where the maker of a promissory note becomes the holder otherwise than " in his own right," and therefore where he becomes the executor of the payee, the promissory note is not discharged: see Chalmers on Bills, 9th ed., p. 248. It follows that in the present case the appointment of the plaintiff as executor did not discharge the promissory note, and he is entitled to enforce it against the defendant as one of the joint and several makers. The rule in equity no doubt is that where a creditor has appointed his debtor to be his executor, the latter is considered to have paid the debt to himself as executor and to be accountable for the money as assets. The appointment will not, however, operate as a release of the debt unless it appears that the rights of the creditors will not be interfered with, and that the testator did not intend to release the debt. There is a presumption that the debt is not released, though it may be rebutted. In the present case, as the appointment of the plaintiff did not discharge the debt at law, the equitable rule does not come into operation. If the plaintiff had been both a maker and the payee of this joint and several promissory note, he could undoubtedly as payee have maintained an action upon it against the defendant, as one of the makers upon his several obligation: *Beecham* v. *Smith* (1); and being in the position of payee by reason of his appointment as executor of the original payee, he is equally entitled to maintain an action against the defendant on his several obligation, thereby avoiding the difficulty of suing on the joint and several obligation. The cases of *Anon* (2) and *Cheetham* v. *Ward* (3) are distinguishable from the present case, because in these cases the action was brought upon the joint and several obligation, whereas here it was brought upon the several obligation only. At common law no distinction was recognized between the obligors in a joint and several obligation, but all were considered to be one person, and consequently when one of them was released by being appointed executor of the obligee or otherwise all were held to be released. In equity, however, the obligors were regarded as separate persons and their respective characters and rights were recognized, so that one of them might be released without releasing the others. The Judicature Act, 1873 (36 & 37 Vict. c. 66), provided that the Court should have both legal and equitable jurisdiction and that in case of conflict between the rules of equity and those of common law the rules of equity should prevail; and these provisions have been re-enacted in the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), ss. 42, 43, 44 and 202: see *In re Applebee.* (4) Further, the Rules of the Supreme Court provide by Order XVI., r. 8, that executors and administrators may sue and be sued on behalf of and as representing the estate without joining any of the persons beneficially interested; and by Order XVIII., r. 5, that claims by and against an executor or administrator as such may be joined with claims by or against him personally. Under these provisions and rules an executor or administrator who is also a beneficiary may as executor or administrator maintain an action against the beneficiaries, either including himself or not.

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(1) (1858) E. B. & E. 442.
(2) Cited 1 Bos. & P. 630, 632n.
(3) 1 Bos. & P. 630.
(4) [1891] 3 Ch. 422.

Morle in reply. The appointment of the plaintiff as executor released the debt absolutely both at common law and in equity: *Strong* v. *Bird* (1) and *In re Applebee.* (2) Neither the rule at common law nor the rule in equity has been abrogated by s. 61 or by any other section of the Bills of Exchange Act, 1882.

March 29. The following judgments were read:—

SALTER J. [after stating the facts, continued:] In my opinion the claim should have been dismissed on the ground that the debt sought to be recovered had been discharged before action. By the common law the effect of the appointment by a creditor of his debtor to be executor of his will is to release the debt on the death of the testator, because a debt is a right to sue and the executor cannot sue himself. Where, as in this case, the executor is one of a number of persons jointly and severally indebted to the testator, the effect in law of the appointment of the executor and the death of the testator is to release the debt as between the testator and all and each of the debtors. The present case is the same as the case cited from 21 Edw. 4, 81*b*, in the report of *Cheetham* v. *Ward* (3): "*Copley*, prothonotary, asked of BRIAN (Chief Justice), if three be bound to a man in an obligation jointly and severally, and the obligee make one of the obligors his executor and die, whether he who is made executor shall have an action against any of the others? And BRIAN said that he should not, for if one was discharged, all shall be discharged; because the making one of them executor is as perfect a discharge in law, as if he had released to one in deed. *Copley*: Sir, the obligation is several. BRIAN: This does not matter; for a recovery against one of them and execution sued, will be a discharge to the others. And so of a discharge made to one of them." This was approved and followed in *Wankford* v. *Wankford* (1) and in *Cheetham* v. *Ward.* (2) A century ago, when *Freakley* v. *Fox* (3) was decided, the rule was so well settled that counsel confined himself to arguing, unsuccessfully, that the doctrine did not apply to negotiable instruments. In that case the payee and holder of a promissory note appointed the maker the executor of his will. The executor endorsed the note to the plaintiff, and it was held that the plaintiff could not recover, because the debt had been released from the date of the death of the testator.

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(1) (1874) L. R. 18 Eq. 315.

(2) [1891] 3 Ch. 422.

(3) 1 Bos. & P. 630, 632n.

In equity the executor is held liable to pay the debt if the interests of the creditors require it and unless he can show a continuing intention on the part of the testator to make him a gift of the debt: *Strong* v. *Bird* (4); *In re Applebee.* (5) When the executor is thus held liable, equity enforces payment by treating the debt as assets in his hands. He can be declared accountable in an administration action and ordered to pay, and on default he may be liable to attachment. In equity, therefore, it is plain that his debt to the estate has been paid: see *In re Bourne.* (6) In that case Romer L.J. said of the executor debtor who was sought to be made liable: "He was indebted to the testator in his lifetime, and by the will he was appointed executor, and he proved the will. The effect of that was that at law the debt was extinguished because there was no one to sue or be sued, but in equity he as debtor is held to have paid himself as executor, and therefore as executor to have in his possession the full amount of the debt as having been paid to him as executor. That is the view of equity, and it is on that view that he can be made liable in an action to administer the estate of the testator."

The result is that, if the plaintiff was not liable in equity to pay the debt, it was discharged by release at the date of

(1) (1698) 1 Salk. 299.
(2) 1 Bos. & P. 630.
(3) 9 B. & C. 130.
(4) L. R. 18 Eq. 315.
(5) [1891] 3 Ch. 422.
(6) [1906] 1 Ch. 697, 708.

the death of the testator; if he was liable in equity, then it was satisfied and discharged by payment at the date of probate. In either case, the debt now sought to be recovered had ceased to exist before action brought.

For the plaintiff reliance was placed on *Beecham* v. *Smith*. (1) In that case, A., B., and C. promised jointly and severally to pay 1000*l*. to C. and D. on demand, and it was held, that C. and D. could enforce against A. his several promise. In that case, however, the debt was in existence when the action was brought; in this case it was not. Reference was also made to the Bills of Exchange Act, 1882, s. 61, to the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 42, 43, 44, and 202, and to Order XVIII., r. 5, and Order XVI., r. 8. I can find nothing in those statutes and rules to alter the view which I have expressed.

The appeal must be allowed and the judgment for the plaintiff set aside and judgment entered for the defendant.

TALBOT J. I am of the same opinion. I need not restate the facts. If a creditor makes his debtor his executor he thereby releases the debt. It is "sanctioned by unquestionable authority that the debtee's discharge of one joint and several debtor is a discharge of all": see *Nicholson* v. *Revill*. (2) The reason is that otherwise the co-debtors, if not released, could, by recovering contributions from the one who was released, defeat his release: see *North* v. *Wakefield*. (3) Therefore if an obligee makes one of two or more joint and several obligors his executor all are released: see *Cheetham* v. *Ward* (4), following a case in the Year Book of Edward IV. And in the case of a negotiable instrument such a release is a good defence to an action not only by the executor but by his indorsee, because the note or bill is discharged and the debt gone: see *Freakley* v. *Fox*. (5) The release is, as is said in the Year Book, equivalent to a release by deed. *Beecham* v. *Smith* (1), on which the learned judge appears to have founded his judgment, has, I think, really nothing to do with this case. It mainly decides that one of joint and several obligors may be sued alone on his several debt; in other words, that the debt is several as well as joint: see *King* v. *Hoare.* (1) The defence here is not that the note is joint and several but that the plaintiff who sues as executor is one of the makers of the note and has been released by the payee, his testator. In *Beecham* v. *Smith* (2) there was no question of a release. It was argued for the plaintiff that the effect of s. 61 of the Bills of Exchange Act, 1882, is that the fact that one of the makers of a note is holder as executor does not discharge it, though if he were holder in his own right the note would be discharged. It appears, however, from *Nash* v. *De Freville* (3) that the words "in his own right" in the section are not used by way of contrast with "in a representative capacity." I do not think that this section has anything to do with discharge by release.

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(1) E. B. & E. 442.
(2) (1836) 4 Ad. & E. 675, 683.
(3) (1849) 13 Q. B. 536.
(4) 1 Bos. & P. 630.
(5) 9 B. & C. 130.

There is another ground upon which in my opinion there was a good defence to the action. Where a debtor is released by being made his creditor's executor, the effect in equity, and perhaps at law, is that the debt is deemed to have been paid by the debtor to himself as executor, and therefore he is deemed to have assets of the testator in his hands: see *Wankford* v. *Wankford* (4), per Holt C.J., and *In re Bourne.* (5) If the debt has been paid, it clearly cannot be sued for by the executor as such, though he may have a right personally to recover contributions from his co-debtors.

In the case before us the will was made before the note, but I think this makes no difference, though at first sight it seems strange that by the appointment of an executor the testator should release a debt which was not then in existence. But an executor is not executor until the testator's death. Until then the will may be revoked or altered and until then, therefore, it is not known that it is the testator's last will. It is then, therefore, that the executor is really appointed

(1) (1844) 13 M. & W. 494, 505.
(2) E. B. & E. 442.
(3) [1900] 2 Q. B. 72.
(4) 1 Salk. 299, 306.
(5) [1906] 1 Ch. 697.

and that the release effected by the appointment operates. Where debts are expressly released by a will it is at the testator's death that it is to be ascertained what debts, if any, are so released: see *Everett* v. *Everett.* (1) The same must be true of the implied release effected by making the debtor executor.

In my opinion judgment ought to have been entered for the defendant, and I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *T. D. Jones & Co., for Edward Harris, Swansea.*

Solicitors for respondent: *F. C. Mathews & Co., for Beor, Wilson & Lloyd, Swansea.*

J. R.

1928
May 11.

BENNETT *v.* EWENS.

Betting—Whist Drive—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *s.* 1.

Whist drives, where an entrance fee is charged and prizes offered, are illegal under the second part of s. 1 of the Betting Act, 1853, which enacts that: "No . . . . room . . . . shall be . . . . used for the purpose of . . . . any money or valuable thing being received by or on behalf of [the] owner [or] occupier . . . . as or for the consideration for any . . . . undertaking . . . . to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any . . . . game . . . ."

Peers v. *Caldwell* [1916] 1 K. B. 371 followed.

CASE stated by Hampshire justices.

The respondent, Ivor Ewens, was charged by the appellant, Sydney Bennett, an inspector of police, under the second part of s. 1 of the Betting Act, 1853 (2), with, on November 14,

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(1) (1877) 7 Ch. D. 428.

(2) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable

1927, unlawfully "using a room for the purpose of certain money being received on behalf of the said occupier as and for the consideration of a certain assurance, undertaking, promise or agreement to pay or give thereafter a certain valuable thing, to wit, a voucher, on the happening of a certain event or contingency of and relating to a card game, to wit, whist, contrary to s. 1 of the Betting Act, 1853."

At the hearing at petty sessions it was proved or admitted that the respondent was the owner and occupier of the Alexandra Hall, Bordon. The hall was divided into two parts, the front part being used as a tea shop. On November 14, 1927, a notice outside the hall advertised that a whist drive would be held on the evening of that day. Admission was 1*s.*, and prizes to the value of 5*l.*—namely 3*l.*, 1*l.*, 12*s.*, 6*s.*, and 2*s.*—were offered. Two police officers attended on that evening, the entrance money being received by the respondent's wife on his behalf, and one of the officers received a card which entitled them both to play as partners in the whist drive. Play began at 7.30 P.M. and there were forty tables, representing 160 persons, and 8*l.* in admission fees. In the game, after a hand had been played, the players so arranged themselves that each pair of partners played the next hand against a different pair of partners, but the same persons remained as partners during the drive. After a certain number of hands had been played the scoring cards were collected and the winners announced, and, later, they received prizes in the shape of vouchers or documents entitling the holders to obtain goods to the values therein mentioned. Immediately afterwards a competition called a "knock-out" was held, 3*d.* being charged to each entrant. In this there was a series of rounds of whist. In the first, three hands were played, and the partners winning two of them qualified to play in the next round. In that round only one hand was played, the winners playing

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thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any . . . . game . . . ."

in the next, and so on until only one pair remained undefeated and were declared the winners. Thirty tables were occupied, representing 30*s*. in admission fees. The above officers took part in both competitions, in both of which the prizes were duly distributed. The premises were regularly used for the above purposes, both before and after the said November 14, 1927. It was contended that an offence had been committed under the second half of s. 1 of the Act of 1853 (1), but the justices being of the opinion that the game of whist as played as above was not an "event or contingency" within the meaning of the Act, dismissed the summons, but stated this case.

Walter E. Lloyd for the appellant. The justices were wrong. In the first place the contention for the appellant was not, as stated by the justices, that the "event or contingency" was the game, but that it was victory or defeat in the game. This is the first case relating to the holding of whist drives taken under the Betting Act; hitherto they have been taken under s. 4 of the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38). "Game" in s. 1 of the Act of 1853, is not to be read as ejusdem generis with the other words therein—*Peers* v. *Caldwell* (2), decided under that section, where the gaming was by means of an automatic machine called "the clown." In prosecutions under the Gaming Houses Act the question arises whether the game in question is or is not one of skill—see *Morris* v. *Godfrey* (3), a whist drive case—but does not arise under the Betting Act. The justices in the present case held that there was no betting; but they would seem to have confused the first and second parts of the section.

[Lord HEWART C.J. And even were it necessary to show betting it seems to me that the entrant stakes his 1*s*. entrance fee against the 5*l*., and the question whether he will win or not depends, in part at any rate, on the shuffling of the cards.]

[SHEARMAN J. These whist drives are tolerated in some districts and not in others. It is most unsatisfactory.]

(1) See note (2) ante, p. 510.

(2) [1916] 1 K. B. 371.

(3) (1912) 76 J. P. 297.

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Peers v. *Caldwell* (1) governs this case. It was disapproved by the Scottish Court of Session in *Granata* v. *Mackintosh* (2); but that case does not bind this Court. *Peers* v. *Caldwell* (1) was followed in *Rex* v. *Peers and Brown* (3), where the Court of Criminal Appeal refused to follow the Scotch case. (2) The facts of the present case bring it exactly within the words of the second part of s. 1 of the Act of 1853.

The respondent was not represented.

LORD HEWART C.J. This case is too clear for argument. The respondent was charged under the latter part of s. 1 of the Betting Act, 1853, with unlawfully "using a room for the purpose of certain money being received on behalf of the said occupier as and for the consideration of a certain assurance, undertaking, promise or agreement to pay or give thereafter a certain valuable thing, to wit, a voucher, on the happening of a certain event or contingency of and relating to a card game, to wit, whist, contrary to s. 1 of the Betting Act, 1853." The case shows that prizes to the value of 5*l.* were offered; there was an admission fee of 1*s.*, and for a supplementary competition called a "knock-out" there was an entrance fee of 3*d.* payable, and the prizes in that competition amounted to 25*s.* The justices came to the conclusion that the game of whist was not an event or contingency within the meaning of the section. I agree that it was not; but it was not the game itself which was said to be an event or contingency; the complaint was that a certain valuable thing was to be paid or given on the happening of a certain event or contingency relating to that game—in other words, victory or defeat. The case is covered, I think, by the decision in *Peers v. Caldwell* (1), followed, as that decision was, in *Rex* v. *Peers and Brown* (3) where, in the latter case, the Court of Criminal Appeal expressly held, as against a contrary view held in Scotland in *Granata* v. *Mackintosh* (2), that notwithstanding that an element of skill entered into the game, the case fell within the second part of this section of the Act of 1853. It seems to me quite clear that the justices misdirected themselves and came to a wrong decision in point of law, that this appeal ought to be allowed, and that the case should go back to the justices with a direction to convict.

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(1) [1916] 1 K. B. 371.

(2) 1916 S. C. (J.) 48. It was also not followed in the Irish case of *Forte* v. *M'Alister* [1917] 2 I. R. 387.

(3) (1917) 33 Times L. R. 231.

AVORY J. I am of the same opinion, and I have nothing to add to what I have previously said on this subject.

SHEARMAN J. I agree, and for the following reasons. I think formidable arguments were put before this Court in the case decided in 1915 (1), to the effect that this sort of thing was not aimed at by this particular Act at all; but the majority of the Court decided that to play a game of the kind there dealt with did constitute an offence within the meaning of the Betting Act, 1853. Frequent attempts have been made since then to subvert or disregard that decision; in particular in *Rex* v. *Peers and Brown* (2) in the Court of Criminal Appeal, but that Court unhesitatingly accepted the decision of the majority of the Court in *Peers* v. *Caldwell.* (1) It is too late now to attempt to reverse those decisions; they are now the clear law on the matter, and the justices ought to have applied the law and convicted.

Appeal allowed.

Solicitors for appellant: *Robbins, Olivey & Lake, for F. V. Barber, Winchester.*

(1) [1916] 1 K. B. 371. (2) (1917) 33 Times L. R. 231.

W. L. L. B.

ATTORNEY-GENERAL *v.* RUDGE.

1928
June 27.

Revenue—Legacy Duty—Gift of Chattels vesting absolutely after intermediate Dispositions—Date of Valuation for Duty—Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *s.* 14.

By s. 14 of the Legacy Duty Act, 1796, chattels not yielding income, in the hands of persons not having power to dispose of them, are not liable to legacy duty, which becomes payable by the persons in whom eventually they vest absolutely:—

Held, that for the purposes of legacy duty their value is to be taken as at the time when they so vest absolutely and not as at the death of the testator.

INFORMATION on behalf of the Crown.

By his will dated April 24, 1843, Edward Rudge (called herein "the testator"), of The Abbey Manor House, Evesham, Worcester, appointed certain executors, and devised to them the said house (called herein "the mansion house") and other hereditaments to the use of his wife and after her death upon trusts since satisfied, and, subject to the said term and trusts, to the use of his eldest son Edward John Rudge for his life, and after his death to the use of the testator's grandson Edward Charles Rudge for his life, and after his death, to the use of the first and every other son of Edward Charles Rudge successively in tail male with divers remainders over. And the testator also bequeathed certain chattels—e.g., plate, furniture, pictures, etc.—in the mansion house to his executors in trust to permit the same to go and be held and enjoyed with the mansion house, so far as the rules of law or equity would permit, by the person who under the will should for the time being be tenant for life or in tail male in possession of the mansion house, yet so that the same should not for the purpose of transmission vest absolutely in any tenant in tail male under the will being the child of any person thereby made tenant for life who should not attain the age of twenty-one years.

The testator died on September 3, 1846, and his widow on February 25, 1870. Edward John Rudge died on

January 29, 1861, and Edward Charles Rudge on December 14, 1909. Edward Charles Rudge had one son only, the defendant John Edward Rudge, who was born on May 31, 1903, and attained the age of twenty-one years on May 30, 1924. Under the terms of the will the defendant on December 14, 1909, became tenant in tail male in possession of the mansion house, and on May 30, 1924, aforesaid, became absolutely entitled to the said chattels.

Under the Legacy Duty Acts, legacy duty at the rate of 1 per centum became due on May 30, 1924, in respect of the said chattels. On December 1, 1925, the defendant delivered an account for legacy duty in respect of the said chattels, and therein gave their value as 2444*l.* 5*s.*, being the amount of the valuations made at the death of the testator in 1846, and claimed that the duty was payable on that value. The value of the said chattels on May 30, 1924, aforesaid was in excess of 2444*l.* 5*s.*, and the informant claimed that it was upon the higher value that the duty was payable. The defendant refused to send in an account on that basis.

Sir Thomas Inskip A.-G. (*J. H. Stamp* with him) for the Crown. The valuation of these chattels for the purpose of legacy duty is on their value on May 30, 1924, and not on the value in 1846. They must be assumed to be given to the donee, the defendant, and not to another. The words in s. 14 of the Legacy Duty Act, 1796 (1), to be interpreted are: "As if the same had been originally given absolutely, and with full power to sell and dispose thereof." It is submitted that they mean: "As if there had been an original gift absolutely, taking effect at a subsequent time"—namely, the time when in fact it did take effect, on May 30, 1924. It is contended for the defendant that they mean "As if the gift had originally been to the defendant eighty years ago," and the valuation must be as at that date. It would be almost impossible to get evidence of that value; a valuer could not value it, and it would be necessary to get the evidence of an antiquarian to decide the question as a matter of history, not of valuation. In *Attorney-General* v. *Cavendish* (1) it was held that legacy duty on residue was payable, not on the death of the testator but at the time when the executor delivered into the stamp office a note of what he intended to retain as residuary legatee. That case is in point, and a decision in favour of the defendant would be contrary to it. The rule contended for works both ways, and not necessarily in favour of the Crown, for the value of the gift might have decreased since 1846. That rule has been acted on by the Inland Revenue authorities for many years, and the ruling of the Court thereon is desired.

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(1) Legacy Duty Act, 1796 (36 Geo. 3, c. 52), s. 14: "No duty shall be paid on any articles of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by, different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof . . . . but if the same shall . . . . come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then . . . . the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely, and with full power to sell or dispose thereof. . . . ."

[*Advocate-General* v. *Oswald* (2) and *Attorney-General* v. *Duke of Bedford* (3) were also referred to.]

T. Simpson Pedler for the defendant. The duty is payable on the value of the gift in 1846. "Originally" refers to this, that the duty is payable as if the gift to the original person who took was absolute instead of by way of enjoyment for a time only. In s. 20 of the Finance Act, 1896 (59 & 60 Vict. c. 28), which deals with chattels passing under a will through the hands of persons not competent to dispose of them into those of one who is competent to do so, and where the Legislature enacts that they are not to be liable for estate duty until they come into the hands of the latter, words similar to those in question in s. 14 of the Act of 1796 are omitted. It is submitted that the reason was that their presence would have defeated the object of the section.

No reply was called for.

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(1) (1810) Wight. 82.

(2) (1848) 10 D. 969, 980; 5 Scots Rev. Rep. (S.C.) (2nd series), 1182, 1190.

(3) [1926] 2 K. B. 184.

ROWLATT J. I think this case is quite clear, although the defendant's case has been very well put by Mr. Pedler. The words to be construed are these: "the same duty shall be chargeable and paid thereon as if [the gift] had been originally given absolutely, and with full power to sell or dispose thereof." This was a gift by a will made in 1843 which took effect upon the death of the testator in 1846. It vested absolutely with full power to sell or dispose of these chattels in 1924, at which date they are to be valued. The question really is, what meaning should be given to the word "originally." The argument for the defendant is that "originally" is an adverb of time, so as to make the words mean: "as if the absolute gift had been made in 1843." The construction for the Crown makes "originally" an adverb going to the quality of the gift and makes the section read thus: "as if the gift which is now taken had been an original gift; that is, as if it had originally come now instead of there having occurred various events in between." That is a very simple construction. There is a difficulty in the way of the defendant's construction and it is this: if it is to be taken as a gift in 1843, is the same duty to be paid as that which would have been paid if the gift had been absolute to the person who had the immediate enjoyment of it, or does it mean the duty which would have been payable if the person now taking it had been alive in 1846 and had taken the gift then? It must be one or the other. But the rates of duty are different in these two cases, for different rates are payable according to different relationships. I put the question to Mr. Pedler, and after some hesitation he said: "I think it means a gift to the original person who took it then as a gift to him absolutely instead of by way of enjoyment for a time only." The inconveniences and injustices following on such a construction are great, as was pointed out by Macdonald C.B. in 1810, in *Attorney-General* v. *Cavendish* (1), which was a very carefully considered case. The Court there heard it on June 1, and then, being in doubt, instead of giving a variety of discordant opinions, they had it reargued on

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(1) Wight. 82, 94.

July 3; the judgment was considered for three weeks, and the judgment delivered was that of the Court, and so it is a judgment of great authority. The Chief Baron says he has been all through the relevant sections, and therefore he must have looked at s. 14, and also at s. 12, which is in pari materia. He examines s. 22, which speaks of settled value, and he decides primarily under s. 35, in which the same sort of problem is involved, and he says clearly that the scheme of the Act is to tax at the date when the gift is received and on the value at that date. He lays that down quite clearly, and I think that judgment is an authority in the present case. After all, it is the common sense of the matter. If one is going to tax a man upon a gift to him, one should tax him upon what he gets and not upon some notional figure, whether in his favour or to his detriment. And in addition, in order to ascertain that notional figure in this case an antiquarian research into values eighty years ago and more would be necessary.

I am quite clearly of opinion that the Crown is right in this matter and is entitled to judgment with costs.

Judgment for Crown.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Clarke, Square & Mills.*

W. L. L. B.

C. A.
1928
July 10, 11.

[IN THE COURT OF APPEAL.]

MORE *v.* WEAVER.

[1926. M. 1745.]

Defamation—Libel—Communications between Solicitor and Client—Absolute Privilege.

Communications passing between a solicitor and his client on the subject upon which the client has retained the solicitor, and which are relevant to that matter, are absolutely privileged.

Opinion of Lord Bowen in *Browne* v. *Dunn* (1893) 6 The Reports, 67, 80 approved and followed.

Morgan v. *Wallis* (1917) 33 Times L. R. 495 not followed.

Decision of Swift J. affirmed.

APPEAL from a decision of Swift J.

The plaintiff, Miss More, sued the defendant, Miss Weaver, claiming damages for libellous statements contained in letters written by the defendant to her solicitors.

The defendant had lent 7500*l.* to the plaintiff for the purchase of a hotel, but very soon thereafter considerable friction arose between them as to the terms of the security to be given, and as to the time when the loan should be repaid. The statements complained of by the plaintiff (which had reference to the business capacity, character and financial position of the plaintiff) were made by the defendant in letters to her solicitors discussing the loan and its repayment, and asking their advice.

The defendant contended that the statements were absolutely privileged.

Swift J., who tried the case with a jury, held that the statements in the letters were absolutely privileged, and therefore that there was no case to go to the jury. He accordingly gave judgment for the defendant.

The plaintiff appealed.

Appellant in person. The defamatory statements complained of are not entitled to the absolute protection claimed for them. In Fraser on Libel and Slander, 6th ed., p. 189, the learned author submits that " no action will lie in respect of any communication passing between the solicitor and client with reference to the matter upon which the client is seeking the professional advice of such solicitor, and which is relevant to such matter." Here the statements were not relevant; they were gross trade libels. I rely on Darling J.'s decision in *Morgan* v. *Wallis* (1), where it was held that the privilege in such a case is qualified only.

Rayner Goddard K.C. and *O'Hagan* for the respondent were not called upon.

SCRUTTON L.J. This appeal is brought by a lady who undoubtedly believes that she has a serious grievance. She has brought several actions, all of which have been dismissed, and has, not unnaturally, got into a state of mind in which she is unable to appreciate the full significance of the position. This action she brought against another lady for libel and slander. It appears that the respondent, the defendant in the action, lent the appellant money to enable her to purchase and carry on a hotel in Kensington. Differences arose between them as to what security should be given for the loan, and as to when and in what circumstances it could be called in. The respondent consulted her solicitors to obtain their advice, and in order to discuss the advice given to her she wrote certain letters to them which in the course of some proceedings ultimately taken against the appellant became public, and thereupon she brought this action against the respondent for libel, the libels being written communications from the respondent to her solicitors, that is, from the client to her solicitors. The question at once arises, on which there has been some difference of opinion, whether communications from a client to a solicitor and from solicitor to client are or are not absolutely privileged. There are a few, not many, cases where untrue communications or statements which are defamatory are by the law of England treated as absolutely privileged, so that, although they are untrue, defamatory and malicious, the law does not allow any action to be brought in reference to them. The reason is that there are certain relations of life in which it is so important that persons engaged in them should be able to speak freely that the law takes the risk of their abusing the occasion and speaking maliciously as well as untruly, and in order that their duties may be carried on freely and without fear of any action being brought against them, it says: "We will treat as absolutely privileged any statement made in the performance of those duties." The absolute privilege given to a judge is the most obvious illustration of this principle. I am at liberty by the law of England in delivering judgment to be as malicious as I like; the law protects me. Why? I take this quotation from North C.J. in *Barnardiston* v. *Soame* (1): "They who are intrusted to judge, ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage." A judge is not privileged to be malicious or careless, but, as was said by Channell J. in *Bottomley* v. *Brougham* (2), he is privileged from inquiry as to whether he is malicious. The reason is that to expose a judge to the risk of actions from every disappointed suitor, who is the more ready to allege malice the more ignorant he is, is to affect his efficiency and freedom as a judge doing a duty to the community. If the judge were to be exposed to the risk of having his observations made the subject of inquiry by a common jury he would be seriously hampered in the performance of his duty. The same absolute privilege applies to counsel. I suppose there are very few counsel who do not, in the course of their speeches, make defamatory statements about some one. Those statements are absolutely privileged, because it is in the interest of the State that counsel should be able to speak freely without being exposed to the risk of an action at the instance of a person whose conduct he may have denounced. The same absolute privilege applies to a witness. A witness going into the witness box and giving evidence may very easily say something defamatory against some one, and it would very much hamper his efficiency as a witness if he said to himself: "Here is a person watching

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(1) 33 Times L. R. 495.

(1) (1674) 6 How. St. Tr. 1063, 1096.

(2) [1908] 1 K. B. 584, 587.

to see whether I say something malicious, and I must therefore be very careful, because I may be sued by him if I say something which he alleges is malicious." In *Watson* v. *M'Ewan* (1) the House of Lords decided that the privilege extends to the statement of a witness to the solicitor taking his proof. The question then is, does the privilege extend beyond judges, counsel and witnesses? Does it extend to a client consulting his or her solicitor and making statements to him for the purpose of obtaining advice and for the purpose of discussing the advice given—statements which are untrue but which are made for the purpose of obtaining advice? Some difference of opinion appears in the reported cases on the question whether the privilege between solicitor and client is absolute, so that no inquiry is possible, or whether the privilege is qualified only, in which case malice on the part of the person making the defamatory statement will defeat the privilege. It was because of that difference of opinion on the authorities that when in this particular case the master and judge struck out the plaintiff's statement of claim as frivolous and vexatious we restored it in order that this question, which is an important one, might be discussed.

The difficulty arises from the fact that Darling J., a judge of great experience, in *Morgan* v. *Wallis* (2) expressed the view that privilege as between solicitor and client is qualified only, and not absolute. There the question arose on an entry in a bill of costs—an extremely unattractive document to him who receives it, but to those who are not called upon to pay it is a document full of human interest—to this effect: "Long attendance on Mr. Edward Morgan and his son-in-law, Mr. Gilmour, conferring on his position in the company which he said was in a solvent condition, but his son, Mr. G. E. Morgan, and his son-in-law, Mr. F. E. Chandler, took advantage of his blindness and illness to withhold information from him, and he could not get his dividend on the preference shares; and he complained that his daughters, Mrs. Gilmour, Mrs. Hall and Miss Morgan, on whose behalf he also instructed me, had received no dividend

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(1) [1905] A. C. 480.

(2) 33 Times L. R. 495.

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since June, 1912, on their preference shares, and he insisted that Mr. G. E. Morgan was applying the company's money for his own ends, and it was believed that at the bottom of the difficulties was Mr. Wilmshurst, who was the auditor of the company, and whom he distrusted." I do not know whether there was any necessity for the solicitor to set out as he did the long conversation; it would have been quite sufficient to say, "Long interview with you in which you explained your difficulties, 13/4." But the solicitor having set out the details of the interview, an action for libel was brought against him by Mr. G. E. Morgan and Mr. Wilmshurst. Darling J. expressed the view that the position of solicitor and client only gave rise to a qualified, and not an absolute, privilege, and that it was competent therefore to investigate the question of malice. In the result Morgan and Wilmshurst did not take very much by their action, for each recovered one farthing damages only. On the other hand, there is the very high authority of Lord Herschell in *Browne* v. *Dunn* (1), where he said: "It seems to me that when communications pass between a solicitor and those who he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of those communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged. There is no authority, so far as I know, to the contrary, and it seems to me that to lay down any other doctrine would be very gravely contrary to the public interest." Lord Bowen in the same case said this (2): "I myself have no doubt at all, in the absence of authority, that if a solicitor has reason to believe that his services may be required by a possible client who does afterwards retain him, what passes between the solicitor and the client on the subject of the retainer, and relevant to the retainer, is covered by professional privilege," and he added: "There is another and more serious point, a point of law, which I desire to keep open so far as my opinion is concerned. I very

(1) 6 The Reports, 67, 72. (2) 6 The Reports, 80.

much doubt whether, when a professional relation is created between a solicitor and client, and communications pass between the solicitor and the client with reference to the prosecution of a third person, or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, provided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client. I very much doubt whether malice destroys that kind of privilege, unless it is shown that what passed was not germane to the occasion." It was not necessary for Lord Bowen to decide the point, but the inclination of his opinion was obviously in favour of the view that in such a case there was absolute privilege, provided the communication was relevant. One can imagine what Lord Bowen probably had in mind. Suppose a client, who has quarrelled with the builder who is building a house for him, goes to his solicitor to discuss the position, and in the course of the interview he makes statements regarding the builder which are untrue. Those statements would, in Lord Bowen's opinion, be absolutely privileged. But suppose in the middle of the conversation the client, being of a gossipy nature, says, "Have you heard that Jones has run off with Mrs. Brown?" that would not be relevant to the discussion. I can quite understand therefore that in certain circumstances a jury may be asked whether the particular communication was relevant to the discussion between the solicitor and client, and in the case I have just put I can imagine that the jury would say that it was not relevant. The eminent judge—Fraser J.—whose loss we all deplore, who spent his life in actions for libel, expressed the opinion in his work, Law of Libel and Slander, 6th ed., pp. 189, 190, that the view suggested by Lord Bowen, and, as I think, entertained also by Lord Herschell, that the privilege between solicitor and client is absolute, was right, and that the decision of Darling J. in *Morgan* v. *Wallis* (1) was erroneous and should not be followed. If then the privilege between solicitor and client as to relevant

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(1) 33 Times L. R. 495.

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communications is absolute, was there in this case any evidence to leave to the jury that the communications were not relevant? What was being discussed between the respondent and her solicitors was whether the loan granted to the appellant should be called in, at what time and on what terms. Obviously the position of the debtor is most relevant to that discussion when the debtor is distrusted by the client. All the defamatory statements appear to relate to the character of the debtor and as to the redemption of the loan. In these circumstances it would be idle to ask a jury whether these communications were relevant to the matters being discussed between the respondent and her solicitors—namely, on what terms the loan should be called in. The appellant says the statements were untrue; they may be, but privilege is only designed to shelter untrue statements. This is a case of absolute, not qualified, privilege, and there was no ground for leaving to the jury the question whether the statements complained of were relevant. Swift J. was right in the view he took, and the appeal must be dismissed.

LAWRENCE L.J. I agree, and have nothing to add.

GREER L.J. I agree.

Appeal dismissed.

Solicitors for respondent: *Maitland, Peckham & Co.*

J. S. H.

EVANS *v.* MORGAN.

1928
May 8.

Poor Law—Relief by Way of Loan—Recovery of—Jurisdiction of Justices—"Court for the recovery of small debts"—Poor Law Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 14), *s.* 46, *sub-s.* 1.

Statute—Repeal—Saving Clause—Construction—Poor Relief Act, 1819 (59 *Geo.* 3, *c.* 12), *s.* 29—*Statute Law Revision Act,* 1873 (36 *&* 37 *Vict. c.* 91), *s.* 1; *Schedule.*

A court of summary jurisdiction is not a "county court or other court for the recovery of small debts" within the meaning of s. 46, sub-s. 1, of the Poor Law Act, 1927, and therefore, under that sub-section, relief granted by way of loan by the guardians to a poor person cannot be recovered therein.

The repeal of s. 29 of the Poor Relief Act, 1819, by the Statute Law Revision Act, 1873, s. 1 and Schedule, was absolute, notwithstanding the proviso to the latter section, and the jurisdiction which was conferred by the former section upon justices to entertain an application for the recovery of money advanced to a poor person by way of loan did not survive the latter Act.

In re R. [1906] 1 Ch. 730 distinguished.

Case stated by the stipendiary magistrate for the division of Caerphilly Higher in the county of Glamorgan.

During the year 1926 the appellant, Evans, on behalf of the Merthyr Tydfil board of guardians, gave to the respondent, Morgan, weekly relief by way of loan amounting to 23*l*. 6*s*.

On September 11, 1927, the appellant, on behalf of the board of guardians, preferred an information against the respondent claiming repayment of the amount of that relief; and in October, 1927, a summons was issued thereupon.

At the hearing of the information it was alleged on behalf of the appellant that he had given to the respondent the relief claimed. For the respondent, whilst the relief was admitted, objection was taken to the magistrate's jurisdiction on the ground that a court of summary jurisdiction cannot make an order against a debtor for the recovery of a civil debt except under statutory authority, and that no such authority exists applying to relief by way of loan. For the appellant it was contended that relief of the kind in question might be recovered in a court of summary jurisdiction by virtue of s. 8 of the Poor Law Amendment Act, 1848, which has been re-enacted in s. 46, sub-s. 1, of the Poor Law Act, 1927. (1) For the respondent it was replied that these subsections only applied to a county court, or some other civil court for the recovery of small debts analogous thereto.

The stipendiary magistrate held that he had no power to make the order sought on the information before him, and that an application should have been made under s. 46, sub-ss. 2 and 3, of the Poor Law Act, 1927. He therefore dismissed the information without hearing any evidence.

The question for the Court was whether the determination of the magistrate was correct in law.

Vaughan Williams K.C. (*Wilfrid Lewis* with him) for the appellant. The stipendiary magistrate was wrong in holding that he had no jurisdiction to entertain the application of the appellant on behalf of the board of guardians for repayment of relief given to the respondent by way of loan. If the Poor Law Act, 1927, is applicable to the present case, the magistrate had jurisdiction under s. 46, sub-s. 1, of that Act, inasmuch as his court is a court for the recovery of small debts within the meaning of that sub-section. Alternatively, it is however submitted that that Act is not applicable here, because the information was preferred before that Act came into force, and that the case must accordingly be determined by the law as it existed before that Act. Though this point was not expressly taken in the court below, it may nevertheless be taken in this Court. Any point of law which was not taken before justices may be taken in this Court if it is a point which no evidence could affect: *Kates* v. *Jeffery*. (2) A fortiori may a point of law of that description be taken where, as here, it is a point affecting the whole jurisdiction of the justices. According to the law as it existed before the Act of 1927 came into force the justices had jurisdiction to make the order asked

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(1) The Poor Law Act, 1927, provides: Sect. 46: "(1.) Any relief granted by way of loan to any person may be recovered in the county court or other court for the recovery of small debts for the district wherein the poor law union or the greater part thereof is comprised, on the plaint of the board of guardians."

(2) [1914] 3 K. B. 160.

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for. The jurisdiction was originally conferred upon them by the Poor Relief Act, 1819, s. 29, which provided that the justices might make an order for repayment of the money advanced to the poor person. The Poor Law Amendment Act, 1834, provided by s. 58 that such relief as might be directed was to be considered as a loan; and by s. 59 that the justices should have power to attach wages in the hands of the employer of the poor person for the repayment of the money, and thus gave an additional remedy. The Poor Law Amendment Act, 1848, s. 8, enacted that all relief granted to any pauper upon loan may be recoverable in the county court or other court for the recovery of small debts, with a proviso that the remedy already provided shall be in force and applicable to the relief. The guardians had now three concurrent remedies for the recovery of relief granted to a poor person by way of loan—namely, an order of justices for repayment under the Act of 1819, s. 29, an order of justices attaching wages under the Act of 1834, s. 59, and the order of a county court or other court for the recovery of small debts under the Act of 1848, s. 8. In that state of the law the Statute Law Revision Act, 1873, was passed, which enacted by s. 1 that the enactments described in the Schedule to that Act were repealed, provided that the Act should not affect (inter alia) "any principle or rule of law or equity, or established jurisdiction, form or course of pleading, practice or procedure," and in the Schedule several sections of the Act of 1819 are mentioned, including s. 29. The last mentioned section is thus no doubt expressly repealed by s. 1 of the Act of 1873, but by virtue of the proviso to the latter section the jurisdiction under the former section is preserved. Where an Act conferring a jurisdiction is repealed by a later Act containing a saving clause that the repeal shall not affect any jurisdiction established under the repealed Act, the jurisdiction under the repealed Act should, in the absence of any inconsistency between the two Acts, be regarded as preserved by the saving clause: *In re R.* (1) Here the jurisdiction of the justices under the earlier Act was well established at the time when the repealing Act was passed,

(1) [1906] 1 Ch. 730.

and there is no inconsistency as regards the jurisdiction between the two Acts, and the jurisdiction must therefore be regarded as preserved by the saving clause in the later Act. A statute law revision repeal is never intended to alter the law, but merely to remove from the statute book enactments which are obsolete or unnecessary: per Lord Finlay in *Leeds Industrial Co-operative Society* v. *Slack*.(1) The jurisdiction is useful and convenient, and it cannot be supposed that it was the intention of the later Act that it should be abrogated. That it is the general view that the jurisdiction was not affected by the repealing Act appears from the fact that it has continued to be exercised by justices throughout the country, and that in Archbold's Poor Law, 15th ed., 1898, pp. 375, 376, forms are given of the summons to be issued by justices on an application by guardians for repayment by a pauper personally of money advanced by them to him by way of loan, and of the order to be made thereupon. The case should be remitted to the stipendiary magistrate, with a direction to him to make the order applied for.

Artemus Jones K.C. and *J. Macmillan* for the respondent were not called upon to argue.

LORD HEWART C.J. This is a case stated by a stipendiary magistrate, which raises the question whether relief granted by a board of guardians to a poor person by way of loan can be recovered in a court of summary jurisdiction. [His Lordship read the case stated and continued :] It is of some importance to consider what was contended on behalf of the appellant in the Court below. One contention and one only was made on his behalf, and it is set out in the plainest terms in the case stated. That contention was that relief granted to a poor person by way of loan may be recovered in a court of summary jurisdiction by virtue of s. 8 of the Poor Law Amendment Act, 1848, which has been re-enacted in s. 46, sub-s. 1, of the Poor Law Act, 1927. On behalf of the respondent it was replied that these sub-sections applied only

(1) [1924] A. C. 851, 862.

to a county court or some other civil court for the recovery of small debts. It is obvious from the case stated that the question in contest in the court below was what is the true meaning of s. 46, sub-s. 1, of the Act of 1927. The contention for the appellant was, not necessarily that the court of the learned stipendiary magistrate was a county court, but that it was at all events a court for the recovery of small debts within the meaning of that sub-section; and the reply of the respondent was that the court of the magistrate did not come within that sub-section. The learned stipendiary magistrate, having that contention and that answer to it before him, decided that he had no power to make the order sought for on an information under s. 46, sub-s. 1, and that the application should have been made under the later sub-sections of that section, which contemplate a different procedure requiring the presence of the employer of the poor person. He therefore rejected the contention on behalf of the appellant, and dismissed the information. In my opinion he was right in so doing, and it is sufficient to dismiss the appeal on that ground.

We have listened, however, to a long and interesting argument, which is not only different from, but the exact opposite of, that stated in the case to have been advanced on behalf of the appellant before the magistrate. That argument is that because the information was preferred before October 1, 1927, s. 46 of the Act of that year has no application to the present proceedings, and that, notwithstanding all the intervening legislation, a right survived under the Poor Law Act, 1819, s. 29, to proceed before the justices for the recovery of the money advanced. That is a point which cannot now be taken on behalf of the appellant, inasmuch as it was not taken in the court below, it is contradictory of the only point that was taken in the court below, and it is based on allegations which are not to be found in the case stated. Further, even if the point could now be taken on behalf of the appellant it would not assist him. The proposition which is put before us is that although s. 29 of the Act of 1819 was in terms repealed by the Statute Law Revision Act, 1873, s. 1 and Schedule, nevertheless by virtue of the proviso to the last mentioned section the jurisdiction of the justices under s. 29 of the Act of 1819 still survived and continued up to the passing of the Act of 1927. The proposition is somewhat similar to that which was the foundation of the case of *In re R.* (1) It seems clear, however, in view of the Act of 1927, that that contention cannot be made good in the present case. That Act is a consolidating Act, and one of its purposes, which it accomplished by s. 245 and the Eleventh Schedule, was to repeal all existing enactments which were inconsistent with or superseded by its provisions, including the remnants of the Act of 1819. The Act of 1927 expressly repeals various sections of the Act of 1819 which had not previously been repealed, but it makes no mention whatever of s. 29 of that Act. It must accordingly be taken that the Act of 1927 regards s. 29 of the Act of 1819 as having been already absolutely repealed by the Statute Law Revision Act, 1873.

I therefore think that the argument now advanced on behalf of the appellant would fail even if it could be entertained, but that it cannot be entertained, because it is not mentioned in the case stated, and it contradicts the only point there taken.

The result, in my opinion, is that this appeal should be dismissed.

AVORY J. I agree. If this case is to be determined on the contention of the appellant in the court below the appeal fails. If it is to be determined on the contention now put forward in this Court by counsel for the appellant that the proceedings in this case commenced before the Poor Law Act, 1927, came into force, the appeal fails, because there is no excuse for that point not having been raised in the special case. If, as has been suggested, that point was taken before the learned stipendiary magistrate, there is no reason why he should not have been asked to restate the case so as to show that the point was taken. The point is not a point of law arising on the face of the case in favour of the appellant which the Court can consider even though it was not taken in the court below. The case of *In re R.* (1), which was cited as an authority for the proposition put forward on behalf of the appellant, appears to me to have no application to the present case. That case decided that where a repealing Act contains a saving clause to the effect that the repeal shall not affect any jurisdiction established under the repealed Act, the Court will take notice of facts showing that the jurisdiction is established, and, if satisfied, may regard it as preserved by the saving clause. In the present case no facts are stated in the special case which show that the jurisdiction of the justices under the repealed Act of 1819 was established at the time when the repealing Act of 1873 was passed, and it cannot therefore be regarded as preserved by that Act.

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(1) [1906] 1 Ch. 730.

We must, therefore, deal with this matter as it comes before us in the case stated and treat it as arising under s. 46 of the Act of 1927, and I agree that the court of the stipendiary magistrate is not a county court or other court for the recovery of small debts within the meaning of that section.

SHEARMAN J. I agree.

Appeal dismissed.

Solicitors for appellant: *Wrentmore & Sons, for Frank T. James, Merthyr Tydfil.*

Solicitors for respondent: *Warren & Warren, for Edward Roberts, Dowlais.*

(1) [1906] 1 Ch. 730.

J. R.

C. A.
1928
May 17, 18;
June 8.

[IN THE COURT OF APPEAL.]

HAIN STEAMSHIP COMPANY, LIMITED *v.* BOARD OF TRADE.

Shipping—Charterparty T.99—Requisitioned Vessel—Collision—War or Marine Risk—Consequence of "Warlike operations"—Mine Planter, with Mines on Board, proceeding after Armistice to United States—Both Vessels to blame.

In 1917 the steamship *Trevanion* was requisitioned by the Admiralty under a charterparty by which the Admiralty was not to be liable for sea risks, but was to be liable for "all consequences of hostilities or warlike operations." Shortly after the Armistice the *Trevanion,* whilst so requisitioned, sustained damage by collision with the steamship *Roanoke,* a United States vessel employed solely for naval purposes as a regularly commissioned mine planter of the United States Navy, and officered by commissioned officers, and manned by a crew, of that Navy. At the time of the collision the *Roanoke* was under her said public employment proceeding from England to the United States with 720 mines on board, but with no other cargo, and with no passengers. There was no evidence as to the circumstances under, or the purposes for, which the mines were being then carried. The collision was caused by the negligent navigation of both vessels, both being equally to blame. On a claim by the owners of the *Trevanion* against the Crown for the damage she sustained:—

Held, (1.) that at the time of the collision, notwithstanding that this was after the Armistice, the *Roanoke* was performing a warlike operation, and that the damage to the *Trevanion* was a consequence of that warlike operation; and (2.), applying *Reischer* v. *Borwick* [1894] 2 Q. B. 548, that the fact that the *Trevanion* was equally to blame with the *Roanoke* for the collision did not absolve the Crown from liability under the charterparty for damage occurring as a consequence of a warlike operation.

Judgment of Rowlatt J. reversed.

APPEAL from a decision of Rowlatt J. on an award stated in the form of a special case.

The claimants, the Hain Steamship Company, Ld., were the owners of the steamship *Trevanion*, which was requisitioned by the Admiralty in 1917. The charterparty, which was in the T.99 form, provided by cl. 18 that the Admiralty was not to be liable for sea risks; and by cl. 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause :—Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

On December 25, 1918, the *Trevanion*, while so requisitioned, sustained damage by collision in the north Atlantic with the steamship *Roanoke*, a United States vessel, which was employed solely for naval purposes as a regularly commissioned mine planter of the United States Navy, was officered by commissioned officers of that Navy, and manned by a United States Navy crew. The *Roanoke* was then under her aforesaid public employment proceeding from Portland, England, to Hampton Roads, Virginia, with 720 mines on board belonging to the Navy Department of the United States. She carried no other cargo and no passengers.

There was no evidence before the arbitrator as to the circumstances under, or the purposes for, which the mines in question were being carried. The collision between the two vessels was caused by the negligent navigation of both, both being equally to blame. As a result of the collision the *Trevanion* was seriously damaged, whereupon her owners claimed that they were entitled to recover from the Crown the cost of her repairs on the ground that the collision and resulting damage were "consequences of hostilities or warlike operations." The Crown contended that the collision was a marine risk, for which they were not liable.

The arbitrator to whom the claim was referred found, so far as it was a question of fact, and held, so far as it was a question of law, subject to the opinion of the Court, that the *Roanoke* at the material time was performing a warlike operation, and that the collision was a consequence of hostilities or warlike operations. He stated that, notwithstanding the fact that the collision occurred about six weeks after the Armistice (1), he was unable, as regards the operation being conducted by the *Roanoke*, to distinguish the case in principle from *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (*The Geelong*) (2), and *Attorney-General* v. *Adelaide Steamship Co.* (*The Warilda*) (3), and he held that the claimants were entitled to recover the cost of repairing the damage suffered by the *Trevanion*, and he so awarded, subject to the opinion of the Court.

Rowlatt J., in giving judgment, said that the operation in which the *Roanoke* was engaged at the material time would, in his opinion, have been a warlike operation had it not been that the collision occurred after the Armistice. While it was true that the Armistice did not put an end to the war, it put an end to hostilities or the use of the *Roanoke* for hostilities. She was going back to the United States, and she was not engaged in hostilities or doing anything to subserve the purpose of hostilities. He therefore could not agree with the arbitrator that the collision was a consequence of a warlike operation, and accordingly he gave judgment for the Crown.

The claimants appealed.

Dunlop K.C. and *Balloch* for the claimants. Rowlatt J. was wrong in holding that the fact that the collision occurred after the Armistice was fatal to the claimants' contention. There was no change in the character of the *Roanoke* after the Armistice ; she was still employed solely for naval purposes, being equipped with mines which could be used only for purposes of destruction. By the express terms of the Armistice the blockade conditions set up by the Allied and Associated Powers continued unchanged and German merchant ships found at sea remained liable to capture. The *Roanoke* was engaged in a warlike operation. There may be a warlike operation although no attack is actually impending, the expression "warlike operations" having a much wider reach than "hostilities": see per Lord Atkinson in *Britain Steamship Co.* v. *The King.* (1) So in *Attorney-General* v. *Adelaide Steamship Co.* (*The Warilda*) (2) an ambulance vessel carrying wounded men was held to have been engaged in a warlike operation. Again, in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (3) it was said that prima facie the transport by sea of war material in time of war from one war base to another is a warlike operation. There Viscount Cave L.C. said (4) that the expression "warlike operations" was "not confined to actual combatant operations against the enemy, whether by way of attack or of defence. . . . . Indeed, it has been said that almost any movement of a warship in the course of her duties may be included in the phrase 'warlike operations.' Probably the phrase includes all those operations of a belligerent Power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war": see also *Attorney-General* v. *Ard Coasters* (5) for observations to the same effect. These authorities are directly in point as warranting the arbitrator's finding that at the time of the collision the *Roanoke* was engaged in a warlike operation.

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(1) Clause xx. of the Armistice of November 11, 1918: "Immediate cessation of all hostilities at sea, and definite information to be given as to the position and movements of all German ships. . . . ."

Clause xxii.: "To surrender at the ports specified by the Allies and the United States all submarines. . . . ."

Clause xxiii. provided for the disarming of certain German surface warships.

Clause xxiv.: "The Allies and the United States of America shall have the right to sweep up all minefields and destroy all obstructions laid by Germany outside German territorial waters, and the positions of these are to be indicated."

Clause xxvi.: "The existing blockade conditions set up by the Allied and Associated Powers are to remain unchanged, and all German merchant ships found at sea are to remain liable to capture. . . . ."

Clause xxxiv.: "The duration of the Armistice is to be 36 days, with option to extend. During this period, on failure of execution of any of the above clauses, the Armistice may be repudiated by one of the contracting parties on 48 hours' previous notice. . . . ."

(2) [1923] A. C. 191.

(3) [1923] A. C. 292.

[They also cited *Ionides* v. *Universal Marine Insurance Co.* (6)]

(1) [1921] 1 A. C. 99, 114.
(2) [1923] A. C. 292.
(3) [1923] A. C. 191.
(4) [1923] A. C. 199.
(5) [1921] 2 A. C. 141.
(6) (1863) 14 C. B. (N. S.) 259.

The second question is: Was the collision the consequence of a warlike operation? The mere fact that a warlike operation is negligently conducted does not in such a case prevent the collision being a consequence of the warlike operation: *Attorney-General* v. *Adelaide Steamship Co.* (1); *Eagle Oil Transport Co.* v. *Board of Trade.* (2) Here clearly the collision was a consequence of a warlike operation and therefore the claimants are entitled to succeed.

Sir Thomas Inskip A.-G. and *Russell Davies* for the Crown. The arbitrator was wrong in holding that because the *Roanoke* was carrying mines she was engaged in a warlike operation, and that the damage to the *Trevanion* was a consequence of a warlike operation. The expression "warlike" means something done in connection with and for the purpose of war. In *Britain Steamship Co.* v. *The King* (3) Lord Atkinson regarded as an essential ingredient of a warlike operation the doing of some act for combative purposes, a view to which he adhered in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service.* (4) In the latter case also Viscount Cave L.C. pointed out that the vessel there in question was carrying ambulance wagons, etc., from one war base to another war base for war purposes, and so it was clearly doing something in connection with and for the purpose of war. Viscount Finlay in the same case took the same view. But anything akin to a warlike, that is, combative purpose in the action of the *Roanoke* at the material time is entirely absent. She was not carrying the mines for a combative purpose. It is not indeed found by the arbitrator for what purpose she was carrying the mines, but it has to be borne in mind that the collision occurred after the signing of the Armistice, which at least involved a suspension of hostilities, and the fair inference is that the *Roanoke* was returning to Virginia to unload the mines, which were no longer required for combative purposes. No effect is given to the existence of the Armistice in the argument for the claimants.

(1) [1923] A. C. 292.
(2) (1925) 23 Ll. L. Rep. 301.
(3) [1921] 1 A. C. 99, 114.
(4) [1923] A. C. 191, 206.

[They also referred to *Admiralty Commissioners* v. *Brynawel Steamship Co.* (1); *Wynnstay Steamship Co.* v. *Board of Trade* (2); and *British and Foreign Steamship Co.* v. *The King.* (3)]

Secondly, even if it can be contended that the *Roanoke* was engaged in a warlike operation, the occurrence giving rise to this claim was not a consequence of a warlike operation. The damage was caused by the joint negligence of the two vessels. In *Attorney-General* v. *Adelaide Steamship Co.* (4) it was decided that a loss occasioned by collision may be none the less the consequence of a warlike operation, because the warlike operation is negligently conducted, but in each case it must be proved by the person claiming damages that the loss was due to a warlike operation. Here that cannot be said, seeing that the negligence of the *Trevanion* prevents the loss being attributable to a warlike operation: see the observations of Lord Sumner in the last cited case (5) on Roche J.'s judgment in *The Larchgrove* (*Owners*) v. *The King.* (6) Here the joint negligence of the two vessels was the intervention of a new factor.

[SCRUTTON L.J. Does not this case come within the principle laid down in *Reischer* v. *Borwick* (7), and approved in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (8)—namely, that if a loss is equally caused by two risks or perils, the person bearing the risk of one of these perils is not relieved, because another peril which he did not insure or bear the risk of equally contributed to the loss?]

Here it was the negligence of the *Trevanion* that really caused the damage. If she had not been negligent, the collision and damage would not have occurred.

Dunlop K.C. in reply. It is not an essential ingredient of a warlike operation that the vessel should at the material time be engaged in a combative operation. No doubt in *Britain Steamship Co.* v. *The King* (9) Lord Atkinson used the words, "combative purposes," but there he was dealing not with the case of a warship, but with a requisitioned ship. Here the *Roanoke* is a warship.

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(1) (1923) 17 Ll. L. Rep. 89.

(2) (1925) 23 Ll. L. Rep. 278.

(3) [1918] 2 K. B. 879.

(4) [1923] A. C. 292.

(5) [1923] A. C. 304.

(6) (1919) 36 Times L. R. 108, 109.

(7) [1894] 2 Q. B. 548.

(8) [1918] A. C. 350.

(9) [1921] 1 A. C. 99, 114.

The fact that both vessels were negligent does not prevent the claimants recovering. It is sufficient to entitle them to recover to establish that one of the causes of damage was a warlike operation: *Reischer* v. *Borwick* (1); *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (2); *Samuel & Co.* v. *Dumas.* (3)

Cur. adv. vult.

June 8. The following judgments were read:—

Scrutton L.J. This appeal raises yet another question as to the incidence of risks during the war between the shipowner and the Government who had requisitioned his ship. Some half-dozen decisions of the House of Lords have relieved this Court from the solution of some of the difficult problems involved, but fresh points keep arising, even ten years after the Armistice.

The claimants were the owners of the steamship *Trevanion* requisitioned by the Government during the war and carrying, at the date of the collision, a cargo of oats, the property of the British War Department, from the United States to Portland for orders. The *Trevanion* was requisitioned under the terms of Charter T.99, which provided for what may be roughly classified as marine and war risks by clauses 18 and 19. Clause 18: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:— Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war. . . . ." The relevant words of cl. 19 are "from all consequences of hostilities or warlike operations, whether before or after declaration of war."

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(1) [1894] 2 Q. B. 548.
(2) [1918] A. C. 350.
(3) [1924] A. C. 431, 467, 468.

The *Trevanion* on the afternoon of Christmas Day, some six weeks after the Armistice, collided with the steamship *Roanoke.* The latter vessel is found by the arbitrator to have been in the possession and control of the United States of America, employed by them solely for naval purposes as a regularly commissioned mine planter of the United States Navy, operated by the Navy Department, officered by commissioned officers of the United States Navy and manned by a United States Navy crew. He finds that at the time of the collision the *Roanoke* "under her aforesaid public employment" was proceeding from Portland, England, to Hampton Roads, Virginia, with 720 mines on board belonging to the Navy Department and with no other cargo and no passengers.

The arbitrator further finds that both vessels were negligent, the negligence beginning with a bad lookout on both ships, probably not unconnected with Christmas Day, and continuing with negligent navigation when, too late, the vessels sighted each other. This is found to be a case of both vessels equally to blame, and is clearly continuing negligence up to the time of collision, not a case where one vessel up to that time acting carefully could have avoided with care the consequence of the other's negligence.

On these facts two contentions were raised by the Crown: (1.) That the *Roanoke* was not engaged in a warlike operation; (2.) That the collision was partly caused by the negligence of the *Trevanion*, and this prevented the collision being the consequence of a warlike operation by the *Roanoke.* I deal first with the second point, which can be shortly disposed of. The decision of the House of Lords in *Attorney-General* v. *Adelaide Steamship Co.* (*The Warilda*) (1) shows that negligence

(1) [1923] A. C. 292.

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of a warship engaged in a warlike operation does not prevent the collision caused thereby from being the consequence of a warlike operation. It is only that the warlike operation is negligently conducted, and the collision happening in that warlike operation is still its consequence, though the navigators of the warship were negligent. So says the House of Lords.

But, further, it has been decided by the House of Lords that if a loss is equally caused by two risks or perils, the person insuring or bearing the risk of one of those perils is not relieved because another peril which he did not insure or bear the risk of equally contributes to the loss. In *Reischer* v. *Borwick* (1), where the ship was insured against collision, and was lost, after the collision damage had been repaired, by perils of the sea acting on the repairs, Lindley L.J. said (2): "Assume that this ship would have floated in calm water notwithstanding the injury she had sustained by the collision, and suppose that, before such injury could be made good, the water became so rough as to get into her and sink her, by reason only of her injured condition, such loss would, in my opinion, be proximately, though not exclusively, caused by the collision, and would fall on the underwriters of a policy worded as this policy is. It may be that such a loss would also be covered by a policy against perils of the sea in the ordinary form; but this does not, in my opinion, shew that no liability attaches under a policy such as the present. Policies may be so worded as to overlap and cover some risk common to them all. The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other; each was as much a proximate cause of her sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy."

That decision was approved by the House of Lords in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance*

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(1) [1894] 2 Q. B. 548.

(2) [1894] 2 Q. B. 551.

Society (1), where a torpedoed vessel got into harbour, but was then sunk in a storm, without which she would have been saved, and there the loss was held to be a war risk. As Lord Sumner says in *Samuel & Co.* v. *Dumas* (2), explaining these two cases: "They were both immediate and concurrent causes, and if either was within the policy, the assured recovered."

In my opinion, therefore, if the *Roanoke* was engaged in a warlike operation conducted negligently so as to cause the loss, the persons liable for "war risks" are not excused, because the loss was equally caused by the negligence of another ship.

There remains the question whether the *Roanoke*, some six weeks after the commencement of the Armistice, was engaged in a "warlike operation." The Armistice did not suspend operations of war: the blockade continued, and any German ships at sea were liable to capture: vessels carrying contraband were captured and condemned by the Prize Court. The state of active war might have revived in full severity. It was admitted that if on Christmas Day the *Trevanion* had struck a floating mine the damage would have been a consequence of a warlike operation. It was, I understood, admitted that if in the actual collision some mines on board the *Roanoke* had exploded, the damage would have been a consequence of a warlike operation. The arbitrator finds that there was no evidence as to the circumstances under, or the purposes for, which the mines were carried by the *Roanoke*. It is very probable they were being carried home to the United States in the belief that the war was coming to an end, in which case the problem would be the same as if a warship was carrying the United States troops back to the United States. But the arbitrator also finds that the *Roanoke* was at the time of the collision proceeding "under her aforesaid public employment"—namely, that of a regularly commissioned mine planter of the United States Navy. He then finds as a fact that the *Roanoke* at the time of the collision was performing a warlike operation.

(1) [1918] A. C. 350.

(2) [1924] A. C. 431, 468.

If there was evidence on which he could so find, his finding is conclusive, and I am clear on the facts found there was such evidence.

The word "warlike" is no doubt a difficult word to define. It is not made easier by the fact that in *Britain Steamship Co.* v. *The King* (*The Matiana*) (1) the House of Lords by three to two held that requisitioned merchant ships sailing in convoy under the orders of a warship, sailing without lights, and zig-zagging to avoid submarines were not performing a "warlike operation." But for that decision one would have thought it clear that the operation was a defensive one against an enemy, carried out because of war, and that both the shepherding warship and the intelligent merchant sheep, who were acting in a most unpeacelike fashion to defend themselves against the enemy, were engaged in a warlike operation.

In *Attorney-General* v. *Adelaide Steamship Co.* (*The Warilda*) (2) a hospital ship carrying wounded home, but with means on board to protect herself against submarines, was held engaged on a warlike operation. Lord Cave in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (*The Geelong*) (3) said (4): "Probably the phrase includes all those operations of a belligerent Power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war." The question of the Armistice was not before the Lord Chancellor, but I should amend the definition by reading "directly lead up to or are the necessary result of." I should like the definition "pertaining to or directly connected with war." Marching down the hill under the command of the Duke of York was as much a warlike operation as the march up; and when Johnny came marching home again he was engaged, in my opinion, on as warlike an operation as when he marched out.

However this may be, in my view, the findings of the arbitrator are conclusive here, with the result that the appeal should be allowed and the decision of the arbitrator restored with costs here and below.

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(1) [1921] 1 A. C. 99.
(2) [1923] A. C. 292.
(3) [1923] A. C. 191.
(4) Ibid. 199.

LAWRENCE L.J. The first question on this appeal is whether the *Roanoke* at the time of the collision with the *Trevanion* was engaged in a warlike operation within the meaning of cl. 19 of charterparty T.99.

The arbitrator has found that at the relevant time the *Roanoke* was in the possession and under the control of the United States of America; that she was employed by the United States of America solely for naval purposes as a regularly commissioned mine planter of the United States Navy; and that she was operated by the Navy Department, officered by commissioned officers of the United States Navy and manned by a United States Navy crew.

The arbitrator has further found that at the time of the collision the *Roanoke* was proceeding "under her aforesaid public employment" from Portland, England, to Hampton Roads, Virginia, having 720 mines on board but no other cargo and no passengers, and that there was no evidence as to the circumstances under, or the purposes for, which the mines were being carried.

The collision occurred on December 25, 1918, some six weeks after the Armistice. The duration of the Armistice was originally fixed at thirty-six days, but was subsequently extended from time to time. During the Armistice the blockade conditions set up by the allied and associated Powers remained unchanged and German merchant ships at sea and vessels carrying contraband goods remained liable to capture, but the other hostilities at sea had ceased.

The *Roanoke* had up to the time of the Armistice admittedly been employed as a warship engaged in operations of war, and the question is whether she was performing a warlike operation when proceeding under orders from England to America during the temporary and qualified suspension of hostilities at sea brought about by the Armistice.

The owners of the *Trevanion* contended that the Armistice did not change the character of the *Roanoke's* employment,

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and that as the war had not terminated the case was simply one of a warship in the employ of one of the belligerent Powers carrying munitions of war from one base to another during a state of war, and consequently that the *Roanoke* was engaged in a warlike operation at the time of the collision.

The Board of Trade, on the other hand, contended that in order to render an operation "warlike" within the meaning of cl. 19 it must be one which is performed in furtherance of hostilities or for combatant purposes, and that an American warship proceeding to America after the cessation of hostilities with munitions of war which were no longer required was not engaged in a warlike operation.

The arbitrator in deciding in favour of the owners of the *Trevanion* has found as a fact and held as a question of law that the *Roanoke* at the time of collision was performing a warlike operation. Rowlatt J. has disagreed with this decision and has acceded to the contention of the Board of Trade. Hence the present appeal.

In my opinion the learned judge has placed too narrow a construction on the expression "warlike operations." In the collocation in which that expression is found in cl. 19 it is plainly wider than the expression "hostilities" which immediately precedes it and to which it is an alternative. A common acceptation of the word "warlike" is "pertaining to war" or "martial," and in my opinion it is used in that accepted sense in cl. 19. Even so, however, that does not solve the present problem, because it still remains to be considered whether the operation in which the *Roanoke* was engaged at the time of the collision can properly be called a warlike operation in the sense which I have indicated.

In the present case the Court is spared the more difficult task of determining whether a merchant vessel officered and manned by her owners is engaged in a warlike operation. Here the Court is concerned with the movements of a warship of one of the belligerent Powers proceeding under orders in a time of war, in the area of the war, and on a mission directly connected with the war. There is no evidence as to the object with which the order was given to the *Roanoke* to proceed to Hampton Roads, and I can well conceive that it would be difficult if not impossible for the Board of Trade to have adduced evidence as to what the intention of the American Naval Authority was in giving the order. If one might be allowed to hazard a guess, the giving of the order was probably due to an intelligent anticipation that the peace negotiations with Germany would have a successful issue, but it is quite likely that the naval authority concerned deferred its decision what should be done with the *Roanoke* and with the mines which she had on board until her arrival at Hampton Roads. It must be a matter of pure conjecture whether on her arrival there she would be ordered to remain in harbour with the mines on board to await the outcome of the peace negotiations, or whether she would be ordered to disembark the mines and either be put out of commission or else be retained in commission and employed in carrying stores or munitions or otherwise assisting the fleet which was engaged in the blockade of the German ports and in other operations of war. One point, however, is clear—namely, that at the time of the collision the *Roanoke* was still in commission as a fully equipped mine planter immediately available in the possible event of the resumption of hostilities.

It cannot, I think, be open to serious doubt that a warship whilst hostilities are still in progress is engaged in a warlike operation when after having accomplished a particular operation of war (whether successfully or otherwise) she is returning home because for the time being she is no longer required at the place where she was conducting that operation, and even although it is unlikely that she will be required again during the war, and in that sense her return may be said to be a peaceable operation. In my opinion the fact that the return of a warship from active hostilities is due to the temporary cessation of those hostilities (either in the particular locality where she was engaged or generally) does not operate to remove the return voyage from the category of warlike operations. Such a return whether after a victory and undamaged or after a defeat and crippled is in my opinion a movement of a combatant force directly connected with its combatant duties, and is therefore a warlike operation.

The authorities cited by counsel do not deal with the effect of the Armistice on the character of the movements of warships, but they contain dicta which have been relied upon by counsel on both sides as supporting their respective contentions.

Britain Steamship Co. v. *The King* (*The Petersham and The Matiana*) (1) was concerned with merchant vessels, both of which were held not to have been engaged in warlike operations at the material times. The actual decisions in these cases have no direct bearing on the question to be determined in the present case, but in the Court of Appeal Atkin L.J. said (2) he was inclined to think that during war almost any action or movement of the combatant forces in the course of their combatant duties while exercised in the area of war could be included in the expression "warlike operations," and in the House of Lords various dicta concerning the operations of warships seem to support the present appellants' contention to this extent, that they point to the correct view being that in the case of a warship the carrying on of actual hostilities is not a necessary ingredient in a warlike operation.

Attorney-General v. *Ard Coasters* (*The Ardgantock and The Richard de Larrinaga*) (3) was concerned with warships, both of which were held to have been engaged in warlike operations at the material times. In *The Richard de Larrinaga* (3) it was decided that a warship proceeding to a particular place in order to pick up a convoy was engaged in a warlike operation. Although this decision does not cover the present case there are some passages in the judgment of Bailhache J. and in the speeches in the House of Lords which are of assistance here. Bailhache J. in the course of his judgment (4) expressed the opinion that almost any movement in wartime at sea of a warship is a warlike operation, and in the House of Lords the result of the opinions delivered seems to me to be that although there may be occasions when movements of warships in time of war are not warlike operations, yet, speaking generally, when a warship is in time of war at sea under orders to proceed to a particular spot to perform a warlike operation whatever its nature may be she is engaged in that warlike operation. If, as I think, the disembarkation of such dangerous and destructive munitions of war as live mines (which are never carried at sea except for the purpose of actual warfare) be a warlike operation, then the opinions expressed in the House of Lords in that case would cover the case of the *Roanoke,* even assuming that the proper inference to be drawn from the facts as found by the arbitrator is that she was proceeding to Hampton Roads in order to disembark the mines which she was carrying when the Armistice was signed.

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(1) [1921] 1 A. C. 99.
(2) [1919] 2 K. B. 670, 695.
(3) [1921] 2 A. C. 141.
(4) [1920] 1 K. B. 700, 706.

Commonwealth Shipping Representative v. *Peninsular and Oriental Branch Service* (*The Geelong*) (1) was concerned with the movements of a merchant vessel called the *Bonvilston,* which at the material time was under requisition by the British Government and was carrying ambulance wagons and other Government stores from Mudros to Alexandria. The speeches delivered in the House of Lords were therefore directed to the question whether a merchant vessel under requisition by the British Government carrying stores in time of war was or was not engaged in a warlike operation. In such a case it is of course of the utmost importance to ascertain for what particular purpose the stores were being carried and the decision that the *Bonvilston* was engaged in a warlike operation was based entirely on the fact found by the arbitrator that the stores were carried from one war base to another war base. Viscount Finlay in his speech states (2) that it was immaterial whether the stores were being carried to a war base for the purpose of warlike operations to be conducted from that base or were being fetched away from a base because the warlike operations conducted from it had ceased, as in either case the carriage was part of a military

(1) [1923] A. C. 191.

(2) [1923] A. C. 204.

operation. This reasoning would a fortiori apply to a warship such as the *Roanoke* when carrying munitions of war from a war base because the warlike operations conducted from that base had temporarily ceased.

A careful perusal of all the opinions delivered in the House of Lords in the cases to which I have referred has satisfied me that they contain nothing which militates against the conclusion at which I have arrived that the *Roanoke* was at the time of the collision engaged in a warlike operation, but on the contrary, so far as they go, support that conclusion. I therefore think that the arbitrator was right and that his award ought to be affirmed on this point.

The second and only other question on this appeal is whether the negligent navigation of the *Trevanion* operates to take the loss out of cl. 19 and to free the Board of Trade from liability. The arbitrator has found that the collision was caused by the negligent navigation of both vessels and that both were equally to blame, the negligence consisting in a bad lookout on both vessels, insufficient porting by the *Trevanion* and failure to keep her course on the part of the *Roanoke*. This question is in my opinion covered by authority. *Attorney-General* v. *Adelaide Steamship Co.* (*The Warilda*) (1) decides that when a ship, engaged in a warlike operation, comes into collision with another ship, the loss occasioned by the collision is none the less a consequence of a warlike operation because such operation is negligently conducted. *Reischer* v. *Borwick* (2) (approved in the House of Lords in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (3)), decides that where a loss is due to two concurrent causes, each being as much the proximate cause as the other, it is no answer to a claim under a policy covering one of the causes that the loss was also due to the other cause which was not so covered.

Applying the principles laid down in those cases to the facts of the present case, I am of opinion that as the negligent navigation of both vessels continued up to the moment of

(1) [1923] A. C. 292.
(2) [1894] 2 Q. B. 548.
(3) [1918] A. C. 350.

the collision and as the negligence of the *Roanoke* whilst engaged in a warlike operation did not alter the warlike character of that operation, the Board of Trade cannot escape liability under cl. 19 by reason of the fact that the loss was also due to the negligent navigation of the *Trevanion.*

In my judgment, for the reasons stated, the appeal succeeds, and the award of the arbitrator should be restored.

GREER L.J. The question for decision in this appeal is whether Rowlatt J. was right in holding that upon the facts stated by the arbitrator, Mr. Raeburn K.C., in a special case, the Board of Trade were not bound by the provisions of cl. 19 of the charterparty known as T.99, to compensate the plaintiffs for the damage to their vessel, the steamship *Trevanion.*

The steamship *Trevanion* on December 25, 1918, collided in the North Atlantic with the steamship *Roanoke* under circumstances which would, if the case had been a claim for damages by the one ship against the other, have resulted in a decision of both to blame. The *Trevanion* was carrying under the terms of the charterparty known as T.99 a cargo of oats, the property of the British war department, for discharge at Rotterdam. The learned arbitrator states in the special case the status of the *Roanoke* and the operations she was conducting at the time of the collision as follows:—

"The steamship *Roanoke* at the time in question was in the possession and control of the United States of America under a bare boat charter. During the period from June 25, 1918, to January 25, 1919, she was employed by the United States of America solely for naval purposes as a regularly commissioned mine planter of the United States Navy, operated by the Navy Department, officered by commissioned officers of the United States Navy, and manned by a United States Navy crew. At the time of the collision with the *Trevanion* the *Roanoke*, under her aforesaid public employment, and officered and manned as above stated, was proceeding from Portland, England, to Hampton Roads, Va., with 720 mines on board belonging to the Navy Department of the United States of America, and was carrying no other cargo and no passengers. She was exhibiting the regulation lights. There was no evidence before me as to the circumstances under, or the purposes for, which the mines in question were being carried." In the arbitration the owners of the *Trevanion* claimed that they were entitled to recover from the respondent Board for the damage occasioned to her by the collision, on the ground that cl. 19 of T.99 imposed that liability on the respondents. The arbitrator held that it did, and stated his findings in the form of a special case raising, among other questions with which this appeal is not concerned, the question whether upon the facts and documents referred to the award was correct in law. Rowlatt J. has held that it was not correct in law. He took the view that the Armistice was sufficient to make it impossible to regard either of the two vessels as engaged on a warlike operation at the time of the collision. In my judgment the learned judge was wrong in so holding, and this appeal ought to be allowed. [His Lordship read cl. 18 and cl. 19 of charterparty T.99 and continued:] It was not suggested by the owners of the *Trevanion* that the collision was a consequence of hostilities, inasmuch as it could not be said that either vessel was at the time engaged in active hostilities; but it was said and, I think, rightly said, that there was sufficient in the findings of the arbitrator, as stated in the special case, to show that the collision was the result of a warlike operation, that is to say, of the operation that was being carried on by the *Roanoke* steaming across the Atlantic towards Hampton Roads carrying mines. Certain of the terms of the Armistice, so far as they related to naval operations, were made part of the special case. These terms included immediate cessation of all hostilities at sea, the surrender of all submarines, the dismantling of certain German surface warships, the right of the Allies to sweep up all minefields and destroy obstructions laid by Germany outside German territorial waters, and the maintenance of existing blockade conditions (German merchant ships found at sea remaining liable to capture). By cl. xxxiv. the duration of the Armistice was thirty-six days with powers of extension, and it was thereby agreed that during such period on failure of execution of any of the preceding clauses the Armistice might be repudiated by one of the contracting parties on forty-eight hours' previous notice.

It is clear from the terms of the Armistice that it did not put an end to all warlike operations. The continuation of the blockade involved a continuance of some warlike operations, so also, in my judgment, did the sweeping up of mines. The steamship *Roanoke* was at the time of the collision in all respects a United States war vessel carrying munitions of war. The American Naval Department were the chartered owners of the vessel in possession, and she was carrying out an operation which, but for the Armistice, could not have been described otherwise than as a warlike operation. If she had been carrying mines during the war for the purpose of planting them she would beyond question have been engaged in a warlike operation. If she had been engaged in lifting mines during or immediately after war it would probably be admitted that her operations could be described as warlike operations. If she had been carrying mines towards the place where it was intended they should be laid, this again would be a warlike operation. If for some reason it had been decided not to lay the mines in their intended position and the vessel had been carrying them back to a place of safety till it could be decided in what other position they should be laid, she would still be engaged in a warlike operation. In my opinion if it is proved that a war vessel is carrying mines during a time of war, this fact would be sufficient of itself to prove that she is engaged in a warlike operation. The existence of a temporary suspension of active hostilities at the time does not in my judgment convert that which would otherwise be a warlike operation into a peaceable operation. The Armistice only operated as a suspension of certain acts of hostility, and did not put an end to the war or render it impossible for warlike operations to continue. The *Roanoke* was at the time of the collision engaged in preserving and moving across the Atlantic munitions of war which could at any time, if the Armistice came to an end, be utilized for the purposes of war.

A number of decisions in the House of Lords and the Court of Appeal were discussed in the course of the argument, but on the question I am now considering, reliance was placed by the Attorney-General almost entirely upon the decision in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (*The Geelong*) (1), as establishing the proposition that in order to bring the carriage of combatant forces or of munitions of war from one area of war to another within the words "warlike operations" it must be proved that they were being so carried for combatant purposes. I assume for the purposes of my judgment that this was part of the ratio decidendi of that case, and of *Britain Steamship Co.* v. *The King* (*The Petersham*) (2), but I think Mr. Dunlop was right in saying that it had reference to the temporary use of merchant vessels, and not to the carriage of munitions of war by the armed naval forces of one of the belligerents.

In my judgment the arbitrator was not wrong in law in deciding upon the facts stated in the special case, that the *Roanoke* was engaged at the time of the collision in a warlike operation.

A further point was raised on behalf of the Board of Trade by the Attorney-General. He contended that inasmuch as the negligence of both vessels contributed to the collision, the collision could not be said to be the consequence of the warlike operation which was being negligently conducted by the steamship *Roanoke*. I do not think this argument ought to prevail. It was decided in *Attorney-General* v. *Adelaide Steamship Co.* (3) that the negligence of a vessel which is claiming under cl. 19 of T.99 does not prevent her from recovering against the Crown if she was engaged in a warlike operation. Lord Shaw uses these words (4): "Faulty navigation on the part of one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk." This must be equally true where the negligence is the negligence of both ships. The loss of a vessel caused by the entrance of water through a hole in the hull caused by a collision due to negligent navigation is without doubt an ordinary sea risk, and a marine underwriter would, in the absence of an F. C. and S. clause, be liable to indemnify the owner in respect of damage so caused. The question to be decided is not whether the collision in this case was a sea risk, but whether being a sea risk, it is one of the risks covered by the exceptions created by the F. C. and S. warranty. If it comes within one or other of the special sea risks described in that clause it ceases to be a risk for which the owner accepts liability under cl. 18, and becomes one for which the charterer accepts liability under cl. 19. If what happened is a consequence of a warlike operation it is none the less so because it is also a consequence of faulty navigation of one or other or of both of the colliding vessels. For the purpose of deciding this case negligent navigation of either or of both vessels is irrelevant.

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(1) [1923] A. C. 191.
(2) [1921] 1 A. C. 99.
(3) [1923] A. C. 292.
(4) Ibid. 300.

When a collision is caused, as in this case it was, by more than one proximate cause, one of which is a "warlike operation," it seems to me that it is taken out of the sea risk by the warranty, inasmuch as it is a consequence of a warlike operation. This view is in accordance with the decision in *Reischer* v. *Borwick* (1) and *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (2), as explained by Lord Sumner in *Samuel & Co.* v. *Dumas.* (3) Lord Sumner says (4): "Where a loss is caused by two perils operating simultaneously at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates. It is then convenient and even necessary to test the application of the term 'proximate' otherwise than by sequence in time, and attempts, more or less successful,

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(1) [1894] 2 Q. B. 548.

(2) [1918] A. C. 350.

(3) [1924] A. C. 431.

(4) Ibid. 467.

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have been made to explain it by using other adjectives, but the rule remains. I doubt if the present question would ever have been disposed of in favour of the respondents simply by saying that the hole had to be made first and then the water came in afterwards. Accordingly the explanation of the two cases cited in this connection, *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (1) and *Reischer* v. *Borwick* (2), I think, is this. In the former, where the question was really one of fact, the pressure of the water overcame the resistance of the bulkhead and the ship filled and sank, but it was the explosion of the torpedo which admitted that pressure to the bulkhead. Thus there were two concurrent causes proximately operating—namely, the opening of the ship's side and the pressure of the sea—and the policy, being free of the consequences of the former, it was free of this loss, though, if the insurance had been against perils of the sea and no more, the loss would have fallen within it. So in the other case. The policy was against collision and damage received in collision only, and it could not be denied that the vessel was damaged in collision. It took two things to sink her: the hole made in collision and water flowing into it. They were both immediate and concurrent causes, and if either was within the policy, the assured recovered."

For these reasons I think the appeal should be allowed.

Appeal allowed.

Solicitors for claimants: *Thomas Cooper & Co.*
Solicitor for Crown: *Solicitor to Board of Trade.*

(1) [1918] A. C. 350.
(2) [1894] 2 Q. B. 548.

J. S. H.

[IN THE COURT OF APPEAL.]

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*Shipping—Charterparty T.*99*—Requisitioned Vessel—Convoy—War or marine Risk—Consequence of "warlike operations"—Requisitioned Vessel, owing to defective Steering-gear, colliding with Warship.*

The steamship *Clan Matheson* was requisitioned on behalf of the Crown in 1917 by a charterparty in the T.99 form, cl. 18 of which provided that the Crown should not be liable for marine risks, but, by cl. 19, should be liable for "all consequences of hostilities or warlike operations." Whilst so requisitioned, the *Clan Matheson* sailed from New York in convoy, destined for Nantes, then a war base, but also an ordinary commercial port, with a cargo, 84 per cent. of which in weight was for the civil commissariat, and 16 per cent. in weight was for war purposes. She was the third ship in the second column from the port hand in the convoy, another vessel, the *Western Front*, which admittedly was at all material times engaged upon and carrying out a warlike operation, being in the corresponding position on the port column. While the convoy was proceeding at night without lights the steering-gear of the *Clan Matheson* suddenly broke down, she sheered seven points off her course and came across the bows of the *Western Front*, by which she was struck and sunk. There was no negligence on the part of those on board the *Clan Matheson*. On a claim against the Crown by the owners of the *Clan Matheson* for her loss:—

Held, (1.) that the arbitrator was entitled to find that the *Clan Matheson* was at no material time engaged upon or carrying out a warlike operation, notwithstanding that a portion of her cargo consisted of war material; and (2.) (Greer L.J. dissenting) that the loss of the *Clan Matheson* was not the consequence of a warlike operation inasmuch as the dominant and direct cause of the loss was the break-down of her steering-gear and her sheering off her course.

Decision of Wright J. affirmed.

APPEAL from a decision of Wright J. on an award stated in the form of a special case.

The Clan Line Steamers, Ld. (hereinafter called "the claimants"), were the owners of the *Clan Matheson*, which was requisitioned in 1917 by the Director of Transport and Shipping. By the charterparty, which was in the T.99 form, it was provided, so far as material, as follows:—Clause 18: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:—Warranted free of capture, seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

The *Clan Matheson* sailed from New York in convoy on May 17, 1918, destined for Nantes, then a war base but also an ordinary commercial port, with a cargo of 363 tons of steel for shells, 5962 tons of barley and 1378 tons of oats. The steel was intended for war use, the whole of the barley was intended for the civil commissariat, and of the oats about two-thirds, or 919 tons, were intended for the military authorities, and about one-third, or 459 tons, for the civil commissariat. Thus about 84 per cent. by weight of her cargo was for the civil commissiariat, and about 16 per cent. for the military authorities. The convoy, consisting of thirty-five to forty vessels, sailed in columns. The *Clan Matheson* was the third ship in the second column from the port hand, the *Western Front* being in the corresponding position on the port column. The convoy was sailing without lights, and each vessel had to keep in line with the ship ahead and to maintain her proper distance. The *Western Front*, which was under charter to the United States Government, and whose cargo was exclusively of war supplies for that Government, was bound for St. Nazaire, then being used as a war base.

The *Clan Matheson* was fitted with a patent steering telemotor gear of a well known make in wide use. At midnight on May 22, 23, 1918—it being then moonlight and the visibility good—the second officer of the *Clan Matheson* came on watch; he tested the steering-gear in accordance with the usual practice and found it to be working properly. The ship had an inclination normally to sheer slightly to port, and under the weather conditions then prevailing, she had to carry port helm to keep her from coming up to the wind. About 1 A.M. the second officer noticed that the *Grelstone*, the ship ahead of him in his column, was half a point or so on his starboard bow. He consequently called to the Lascar quartermaster who was at the wheel to port the helm. Noticing that the *Clan Matheson* was not moving to starboard the second officer again called to the quartermaster to port the helm, and for the second time received the reply that he (the quartermaster) was doing so. The second officer then went himself and found the wheel hard-a-port. The action of the wheel gave the second officer the impression that something in the steering-gear had suddenly given way. He noticed that the *Western Front* was abaft his beam, and that the *Grelstone* ahead of him had come out further on his starboard bow. He immediately called the captain and the chief engineer, who both reached the bridge promptly. The engines were put astern and the appropriate signals made. The engineer made an adjustment to the steering apparatus which might or might not have corrected the steering. Meanwhile the *Clan Matheson* had swung seven points off her course and was heading north by west. She thus came across the bows of the *Western Front*, by which vessel she was struck about midships, and approximately at right angles. The *Clan Matheson* sank within two hours and became a total loss. The period between the second officer first noticing that the *Clan Matheson* was out of her course and the collision was estimated by him as from two and a half to four minutes.

The claimants contended that both the *Western Front* and the *Clan Matheson* were at the material time engaged upon and carrying out a warlike operation within the meaning of the charterparty, and that even if this was not so as regards the *Clan Matheson*, her loss was nevertheless a consequence of warlike operations. It was admitted that the *Western Front* was at all material times engaged upon and carrying out a warlike operation, but the Crown denied that the *Clan Matheson* was so engaged or that her loss was a consequence of a warlike operation, and contended that the sheering of the *Clan Matheson* was a new act outside any warlike operation of the *Western Front*, and that it was this act of sheering which was the real and proximate cause of the loss.

The arbitrator to whom the claim was referred found, so far as it was a question of fact, and held, so far as it was a question of law, that the *Clan Matheson* was not at any material time engaged upon or carrying out a warlike operation; that there was no breach of any warranty of seaworthiness in respect of the *Clan Matheson;* that there was no negligence on the part of the claimants or of those in charge of the *Clan Matheson;* that immediately before the collision her steering-gear broke down and failed to operate, whereby she sheered to port and across the course of the *Western Front;* that her sinking was proximately caused by the impact of the *Western Front* moving in the course of a warlike operation which she was then carrying out; that the sheering of the *Clan Matheson* to port was not the real or proximate cause of her loss, but that it was a consequence of warlike operations. He therefore awarded, subject to the opinion of the Court, that the claimants were entitled to recover the value of the vessel.

Wright J., in giving judgment, accepted the arbitrator's finding that the *Clan Matheson* was at no material time engaged upon or carrying out a warlike operation. On the question whether her loss was a consequence of a warlike operation, he held that the *Western Front* came into collision with the *Clan Matheson* only because of the sudden departure of the latter from her proper line and position, and because by an extraordinary and unanticipated motion she put herself directly in the way of the *Western Front*, the collision being thus inevitable. If ships could be personified, as in language they always tended to be, the collision was in no sense the voluntary act of the *Western Front*, but was simply and solely the act of the *Clan Matheson*, and her loss was "due to her own fault," to use the language of Lord Sumner in *Attorney-General* v. *Adelaide Steamship*

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Co. (1) In his judgment her loss was due not to a warlike operation of the *Western Front*, but to the fortuitous motion of the *Clan Matheson*, which was in no sense a warlike operation. The *Western Front* was the instrument, but not the cause, of the loss. He accordingly gave judgment for the Crown.

The claimants appealed.

Langton K.C., *James K.C.* and *James MacMillan* for the appellants. Wright J. was wrong in holding that the loss of the *Clan Matheson* was solely due to a movement on her own part and was not a consequence of a warlike operation. He has arrived at this conclusion by wrongly personifying the vessels and attributing fault to the *Clan Matheson*, whereas it has been found in terms that there was no negligence on the part of those on board. There is no authority for the proposition that an inanimate cause which has brought about a casualty—in this case the break-down of the steering-gear—can be treated as affecting legal rights. The language of Lord Dunedin in *Attorney-General* v. *Ard Coasters* (2) is directly applicable: "In the *Ard Coasters* case I think the judgment may be put in a form which much resembles a syllogism. Patrolling for submarines is a warlike operation. The *Tartar* was engaged in such patrolling. In the course of that operation, and while engaged in it, she ran into the *Ardgantock*. The collision is therefore the consequence of a warlike operation." Substitute the *Clan Matheson* for the *Ardgantock*, and the position is precisely the same, except for this, that the *Clan Matheson* was not at the time of the collision upon her proper course. That circumstance, however, cannot affect the legal position, as the *Clan Matheson* was where she was not by a voluntary or negligent act on the part of those on board, but by the break-down of her steering-gear. Lord Sumner's view in the same case (3) supports the appellants' contention; so, too, do the observations of Viscount Finlay. (4) In the later case of *Commonwealth Shipping*

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(1) [1923] A. C. 292, 304.

(2) [1921] 2 A. C. 141, 152.

(3) [1921] 2 A. C. 153.

(4) Ibid. 147, 148.

Representative v. *Peninsular and Oriental Branch Service* (1) Viscount Finlay said (2): "It is settled by decision that the mere fact that a collision between merchantmen caused by navigating at full speed at night without lights in obedience to regulations in force during wartime does not by itself make the loss one resulting from a war risk within the meaning of this clause. But if one or both of the vessels were engaged at the time in a warlike operation it becomes a war risk as being a consequence of a warlike operation." Here, admittedly, the *Western Front* was engaged in a warlike operation, and it follows that the collision was a consequence of that warlike operation: see also the observations of Lord Sumner in *Attorney-General* v. *Adelaide Steamship Co.* (3) If there were two causes which contributed to the loss, the Crown cannot escape liability: *Reischer* v. *Borwick.* (4)

Secondly, the loss was a consequence of a warlike operation, inasmuch as the *Clan Matheson* was herself engaged in a warlike operation. Both she and the *Western Front* were on the same voyage, in the same convoy, and both had war materials on board. In *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (5) Lord Sumner rather indicated that if war stores formed but a small part of the cargo it might be said that the vessel was not engaged in a warlike operation; but here nearly 1300 tons of war material were on board the *Clan Matheson*, and to such a quantity the de minimis principle is clearly inapplicable.

Raeburn K.C. and *Russell Davies* (*Sir Thomas Inskip A.-G.* with them) for the Crown. The argument for the appellants comes to this, that where in wartime a collision takes place between a warship and a merchant ship, the mere fact of the collision is enough to constitute the resulting damage a consequence of a warlike operation, the only reservation to this wide proposition being that if the action of the merchant ship was wrong, in the sense that its course was wrongly directed by human agency, the position may be different.

(1) [1923] A. C. 191.
(2) Ibid. 200.
(3) [1923] A. C. 292, 301.
(4) [1894] 2 Q. B. 548.
(5) [1923] A. C. 191, 210.

Here we are not assessing blame for the collision; we have to discover the cause of it. If the cause of the collision was the action of the *Clan Matheson* it matters not whether that action was due to human or mechanical agency. If what led to the collision was the act of the man at the wheel of the *Clan Matheson* putting the helm the wrong way, and as a consequence the vessel was impaled on the *Western Front*, it could not be contended that the resulting damage was the consequence of a warlike operation.

[GREER L.J. How does that agree with the decision in *Hain Steamship Co.* v. *Board of Trade*? (1)]

There the warship was not merely passive, as was the *Western Front* in this case. Here, the *Clan Matheson* had no right to be where she was, and the warlike operation of the *Western Front* in no way contributed to the collision. Suppose while a person is driving a motor car the steering-gear jams and the car runs into a telegraph pole, with the result that the bonnet of the car is damaged. It could not be said that the damage was due to the telegraph pole. In *Attorney-General* v. *Adelaide Steamship Co.* (2), Lord Sumner said (3): "So in *The Ardgantock* (4) Bailhache J. is reported as saying, 'if negligence on the part of the *Ardgantock* was the effective cause of the loss the case would be one of loss by marine risk.' Literally, this was right, though it is not easy to see what is meant by negligence, as such, being the cause; but no doubt what was meant was that, if the loss of the *Ardgantock* was proved affirmatively to be due to her own fault, it would not be caused by the warship and its warlike operations." Lord Sumner there uses the word "fault" not as limited to actionable negligence but as covering any act on the part of the vessel which she ought not to have taken.

[GREER L.J. Is not the absence of effective steering-gear equivalent to the absence of lights in the case of *The Ardgantock* (4)?]

No. Merchant vessels were expected to keep to their convoy course. In fact the *Clan Matheson* came seven points

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(1) Ante, p. 534.
(2) [1923] A. C. 292.
(3) [1923] A. C. 304.
(4) (1919) 35 Times L. R. 604, 605.

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off her course and ran into the warship, which was purely passive. We rely on the view expressed by Lord Sumner in *Attorney-General* v. *Adelaide Steamship Co.* (1), where he said (2): "When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same, if his action was only an error of judgment or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision. I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions, when the question is how to attribute blame to persons, but is only evidentiary in insurance actions, where the question is whether the event has happened which entitles the assured to be indemnified." That, we understand, means this: if in consequence of the collision one side proposes to make the other liable in damages he has to prove that the collision was caused by the negligence of the other; but if the question is what was the cause of the collision the action that the ship took is the only thing to be regarded in order to discover what it was, as distinct from who it was, that caused the collision. That appears to have been the view taken by Roche J. in *Larchgrove (Owners)* v. *The King* (3) and in *Charente Steamship Co.* v. *Director of Transports.* (4)

On the question whether the *Clan Matheson* was engaged in a warlike operation, that is a question of fact which has been concluded against the appellants by the arbitrator's finding.

(1) [1923] A. C. 292.
(2) Ibid. 305.
(3) (1919) 36 Times L. R. 108.
(4) (1921) 38 Times L. R. 148.

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Langton K.C. in reply. We rely on the view expressed by Viscount Finlay in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service.* (1)

[SCRUTTON L.J. How far do you carry that? Suppose a warship anchors, and a merchant ship's steering-gear breaks down and she runs into the warship. Is the collision a consequence of a warlike operation?]

Yes; once a warlike operation always a warlike operation. In view of the decision of this Court in *Hain Steamship Co.* v. *Board of Trade* (2) it cannot be said that the collision in this case, where there was no negligence on the part of the *Clan Matheson*, was not a consequence of a warlike operation.

SCRUTTON L.J. If the point at issue in this case were coming before me for the first time I should have desired to take time to consider my opinion on the very difficult questions which are involved, but this is one of a series of cases as to the meaning of "consequences of warlike operations" on which we have the guidance of six cases in the House of Lords, and as, in view of the amount in dispute, it is quite obvious that this case will go to the House of Lords, I do not think it necessary to take time to put my judgment into more careful language. I am the more ready to take this course, as but for the guidance of the House of Lords I should have gone wrong, and unfortunately have remained under the impression that I ought to go wrong.

The facts giving rise to the dispute are these: a convoy which the arbitrator puts at thirty-five to forty ships of several columns, not all of which were English ships, was proceeding at night in a manner in which in peace time no sensible shipmaster would dream of proceeding—without lights. The columns were three ship's lengths apart, and they were proceeding according to order, and zigzagging at given times, a manœuvre which requires to be executed with accuracy. One of the ships, the *Clan Matheson*, was third in position in her column and the *Western Front* was the third in her column on the port hand of the *Clan Matheson*. Suddenly

(1) [1923] A. C. 191, 201.

(2) Ante, p. 534.

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the steering-gear of the *Clan Matheson* broke down. This was not easy to detect at once. Lights would probably have enabled it to have been detected more quickly. It was seen by those on the *Clan Matheson* that the vessel ahead was getting on the starboard bow of the *Clan Matheson*, and the repeated orders of the officer in charge of the *Clan Matheson* for her helm to be ported did not seem to produce any effect. The officer went to the wheel and found that it had been put hard-a-port, but that the ship was paying no attention to it. The master and engineer were hastily summoned and the engineer tried to do something to get the steering-gear to work, but this had no effect. The *Clan Matheson* then found herself in front of the *Western Front*, which cut her down, and she sank in two hours. It is quite obvious that the sheer might have taken the *Clan Matheson* into the side or into the stern of the *Western Front* instead of on to her bows. It is found by the arbitrator that there was no negligence on the part of either ship, that is to say, that there was nothing which those on board the *Clan Matheson* could have done to avoid the sheer and, having regard to the fact that the ships were proceeding without lights in lines in this formation, that there was nothing which the *Western Front* could have done to get out of the way; because it has to be borne in mind that the *Western Front* had first to appreciate the fact that the vessel abreast of her was coming towards her, and, secondly, that if she stopped dead the vessel behind might run into her. We have then this: that the steering-gear of the *Clan Matheson* broke down, and in consequence of that she sheered seven points right across into the other column, and the fact that there was no negligence on the part of either the *Western Front* or the *Clan Matheson*. In view of those facts, what is the legal position? The Admiralty, the charterers of the *Clan Matheson*, are not to be liable if she is lost by collision, and the *Clan Matheson* was lost by collision. So far the Admiralty are not liable. The risks of war which are taken by the Admiralty are the risks excluded by the following clause: "Warranted free of capture, seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." It seems to me therefore that the question to be decided is: was the collision a consequence of a warlike operation—not, did it happen in the course of a warlike operation, not, is a warlike operation one of the events which in their totality contributed to the collision, but was the collision a consequence of a warlike operation in the sense in which that expression is understood in insurance matters?

One is apt to think that T.99 presents a new problem. It began, however, in 1863 in *Ionides* v. *Universal Marine Insurance Co.* (1), where the exception was "Warranted free from capture, seizure and detention, and all consequences thereof . . . . and free from all consequences of hostilities . . . ." and we have the advantage of the very careful judgments delivered in that case by Erle C.J. and Willes J., which should be studied by all those arguing insurance cases. Erle C.J. said (2): "I agree . . . . that the words of the exception in this policy are to be construed as they would be if the assured had re-assured his cargo against the perils which are excepted by the warranty now in question; so that, to make the policy attach, the Court must in that case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim causa proxima non remota spectatur is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it." In the same case Willes J. said this (3): "If you cannot presume the exception of loss from a consequence of hostilities to involve all consequences however remote, you are necessarily driven to say that the word 'consequences' is to be dealt with according to the ordinary rule, as meaning proximate consequences only."

Here the question is, was the collision, which obviously resulted from the break-down of the steering-gear of the

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(1) (1863) 14 C. B. (N. S.) 259. (2) (1863) 14 C. B. (N. S.) 285.
(3) (1863) 14 C. B. (N. S.) 290.

Clan Matheson, the proximate consequence of a warlike operation? The difficulties which seem to me to follow from the decisions of the House of Lords are these: First, but for the decision in *Britain Steamship Co.* v. *The King* (*The Matiana*) (1) I should have been confident—possibly wrongly confident—that sailing in convoy under the conditions prescribed was a warlike operation. A number of merchant ships desire, and the Government desire, that the ships shall avoid attack by the enemy, and to avoid such attack they adopt a series of defensive precautions which they would never dream of adopting in time of peace, because they are much too dangerous; they sail in a dense body of some forty ships altogether; they sail without lights at night; and they sail having orders at given times to alter their course in a particular way. But for the decision of the House of Lords I should have thought that these were defensive operations against enemy attack, and being so they were warlike operations. I do not understand that warlike operations are confined to attacking operations. Defensive operations seem to me to be as much warlike, pertaining to or connected with war, as attacking operations. I know that it has been said by a judge, for whose judgment I have the greatest respect, that the convoying warship is the shepherd and the convoyed merchant ships are the sheep, the shepherd doing something warlike and the sheep doing nothing warlike. I think if the unfortunate sheep in a convoy were asked what they were doing and whether they were engaged in a peaceful operation, they would say they were engaged in a very dangerous operation to avoid attack by an enemy. Left to myself I would have said that sailing in a convoy without lights at night was a warlike operation; but I have to start my view of the events that happened in this case by assuring myself that I am quite wrong in that, because it was said in *Britain Steamship Co.* v. *The King* (*The Matiana*) (1) by three law lords to two that sailing in convoy is a peaceful operation. Then comes another matter which the House of Lords will have to solve. The *Western Front* was manned by United States naval units and was carrying war stores to a war base; it is said therefore that she was engaged in a warlike operation. The collision was caused or happened because the *Clan Matheson* got in front of the *Western Front*, which had not time to stop, and the *Clan Matheson* could not avoid getting there, because of the break-down of her steering-gear. If everything that happens during a warlike operation is a consequence of it, Wright J. was wrong in applying the ordinary rule of causa proxima to the term "consequences of a warlike operation." There is some justification in the House of Lords cases for saying that certain of their Lordships have thought that everything that happens during a warlike operation is a consequence of the warlike operation. There is an old fallacy, post hoc propter hoc—a fallacy amusingly illustrated by the question asked by the authors of The Rejected Addresses, "Who fills the butchers' shops with large blue flies?" the answer being that they and the other evils enumerated were there owing to the existence of Napoleon. Post hoc propter hoc is generally wrong. Ante hoc propter hoc I suppose is worse. The question here seems to be whether simul hoc propter hoc is a right conclusion, and whether it is correct to say, if two things happen at the same time, one must be the consequence of the other. Lord Dunedin has used language in *Attorney-General* v. *Ard Coasters* (1) which suggests that it is proper to say that anything that happens during a warlike operation is a consequence of it. He there said (2): "I think the judgment may be put in a form which much resembles a syllogism. Patrolling for submarines is a warlike operation. The *Tartar* was engaged in such patrolling." He omits the third member of the syllogism: "She was engaged in a warlike operation." Then he goes on to a second syllogism: "In the course of that operation, and while engaged in it, she ran into the *Ardgantock*. The collision is therefore the consequence of a warlike operation." That seems to say that if anything happens during a warlike operation it is a consequence of it. On the other hand Lord Sumner, in a passage in *Attorney-*

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(1) [1921] 1 A. C. 99.

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(1) [1921] 2 A. C. 141. (2) [1921] 2 A. C. 152.

General v. *Adelaide Steamship Co.* (1), which has been read to us by each counsel, takes the view that it is not enough to say that a thing has happened "during" the warlike operation, it must be shown that it is "the consequence of" the warlike operation. "When damage is done by two ships," said Lord Sumner (2), "coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same, if his action was only an error of judgment or wrong but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision. I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions, when the question is how to attribute blame to persons, but is only evidentiary in insurance actions, where the question is whether the event has happened which entitles the assured to be indemnified." That is also the view taken by Wright J. in his careful working out of the present case, and it is the view which I myself would take to be the correct one. Whether it is correct in view of the apparent differences in the views of the House of Lords the House of Lords itself must tell us.

In the first case after the war which came into this Court —*British and Foreign Steamship Co.* v. *The King* (3)—I said this, part of which I agree is wrong in view of the later decisions in *Britain Steamship Co.* v. *The King* (*The Matiana*) (4) and *Hain Steamship Co.* v. *Board of Trade* (5): "I understand the plaintiffs do not dispute that it is not enough for them to prove that the loss happened in the course of a military operation, or that a military operation was one of the contributory causes which together produced the loss. The military operation must be the direct or dominant cause of the loss, and no new and independent cause must operate after the military operation alleged. The question then is, Have the plaintiffs proved that the direct or dominant cause of the loss was military operations without the intervention of any new and independent effective cause?" That is the line which Wright J. has followed in this case, and it is the line I propose to follow till the House of Lords tells me I am again wrong in the views I have formed. I take the case of a war vessel lying at anchor, and a merchant vessel which should pass quite clear of her suddenly sheers owing to her steering-gear breaking down, without negligence, and runs into the war vessel at anchor. In my view it is impossible to say that that loss is a consequence of a warlike operation. I take another case. Suppose an insurance is effected against consequences of railway operations, and a misguided person commits suicide by jumping in front of a train. Would that be a consequence of a railway operation within the meaning of the policy? To me it appears that the proximate cause of the death is the man's own act. For these reasons I have come to the conclusion that Wright J. took the correct view upon this question.

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(1) [1923] A. C. 292.
(2) Ibid. 305.
(3) [1918] 2 K. B. 879, 886.
(4) [1921] 1 A. C. 99.
(5) Ante, p. 534.

Another point was taken—namely, that the *Clan Matheson* as well as the *Western Front* was engaged in a warlike operation. The arbitrator has found that the *Clan Matheson* was going to a port which was both a war base and a commercial port with a mixed cargo, 84 per cent. of which in weight was for civil purposes and 16 per cent. in weight for war purposes—namely, 360 tons of steel. The balance of the cargo consisted of barley and oats intended for the military authorities—for horses and mules, and some possibly for feeding the Highland regiments. The arbitrator has found that the *Clan Matheson* was not carrying out a warlike operation, and it appears to me that whether there is enough warlike cargo on the ship to make her engaged in a warlike operation is a question of degree and fact for the arbitrator. I observe that in *Britain Steamship Co.* v. *The King* (*The Petersham*) (1) in the House of Lords the requisitioned vessel, which was carrying a cargo of iron ore for England, was treated as not carrying out a warlike operation, although the inference was pretty strong that the ore was being carried to be used for warlike purposes. I also notice that Lord Cave in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (2) speaks of the cargo of iron ore on board the *Petersham* as intended to be used in the manufacture of munitions, but that did not make the vessel engaged in a warlike operation. I am unable to interfere with the finding of the arbitrator that the *Clan Matheson* was not engaged in a warlike operation. Therefore on the two points taken by the appellants I think Wright J. came to a correct decision when he held that the proximate, dominant and direct cause of the loss was the break-down of the steering-gear of the *Clan Matheson* and her subsequent sheering, and that that was not a consequence of a warlike operation in the sense in which that phrase is used in *Ionides* v. *Universal Marine Insurance Co.* (3); and as to the second point, that on the arbitrator's finding the *Clan Matheson* was not engaged in a warlike operation. The appeal therefore, in my opinion, should be dismissed with costs.

Lawrence L.J. This appeal raises the question whether the loss of the *Clan Matheson* was a consequence of a warlike operation on the part of the *Western Front* within the meaning of cl. 19 of Charterparty T.99, and therefore excluded from the risks undertaken by the owners under cl. 18, or whether, on the other hand, the collision fell within cl. 18, as a sea risk not excluded by cl. 19. It is admitted that at the time of the collision the *Western Front* was engaged in a warlike operation and that the collision was not due to any negligence on the part of that vessel. As regards the *Clan Matheson*, the arbitrator has found that at the time

(1) [1921] 1 A. C. 99.
(2) [1923] A. C. 191, 198.
(3) 14 C. B. (N. S.) 259.

of the collision she was not engaged in a warlike operation. It has been held by the House of Lords in *Britain Steamship Co.* v. *The King* (1) that neither sailing in a convoy (*The Matiana*) nor sailing without lights (*The Petersham*) constituted a warlike operation. Mr. Langton faintly argued that if the two operations are combined—sailing in a convoy and sailing without lights—such a combined operation amounts to a warlike operation. In my opinion there is nothing in that contention. The main ground, however, upon which the appellants challenged the finding of the arbitrator was that as the *Clan Matheson* was proceeding to a war base and was carrying as part of her cargo steel intended for war use, the arbitrator was bound as a matter of law or principle to hold that she was engaged in a warlike operation. The steel so carried weighed 363 tons and constituted 16 per cent. of the total tonnage of the cargo; the remaining cargo weighed 7300 tons and consisted of barley and oats intended chiefly for the civil commissariat and not for war use. In the case of a merchant vessel such as the *Clan Matheson* carrying a cargo composed partly of ordinary merchandise and partly of war material and proceeding to a port used, although not exclusively, as a war base, it is essentially a question of fact whether the carriage of such war material and the destination of the vessel cause her to be engaged in a warlike operation or not. It is a question of degree and one for the arbitrator, whose finding on this point is not open to review.

There remains the more difficult question whether the collision was a consequence of a warlike operation on the part of the *Western Front*. Upon this I am in agreement with the decision of Wright J. and the judgment of Scrutton L.J., and have very little to add. What the Court has to discover is what was the real cause of the collision, and not who was the cause of it, nor whether it was caused by negligence on the part of those on board the *Clan Matheson* or by a defect in her machinery. Both vessels were sailing in the convoy with a number of other vessels, at prescribed distances and at a prescribed speed. The *Western Front*,

(1) [1921] 1 A. C. 99.

although a warship engaged in a warlike operation within the decisions, was under convoy in the same manner as the merchant vessels which accompanied her, her station in the convoy being in the next column opposite to the *Clan Matheson*. At the time of the collision the *Western Front* was in her proper place, proceeding at her proper speed and keeping her proper distance. Suddenly and without warning the *Clan Matheson* sheered to port at nearly right angles, and impaled herself on the stem of the *Western Front*. Nothing that the *Western Front* could have done would have avoided the collision. The case appears to me to be analogous to that put during the argument of two vessels in the same anchorage, one being a warship engaged in a warlike operation and the other a merchant vessel, and the latter breaking loose from her anchorage owing to a latent defect in her cable, and drifting on to the ram of the warship and sinking herself. In such a case it would be strange if it were held that the loss of the merchant vessel was a consequence of a warlike operation of the warship. In this case what has to be decided is whether it was the action of the *Clan Matheson* or the action of the *Western Front* which brought about the collision, and not what caused the *Clan Matheson* to get into the position which made the collision inevitable, nor who, if any one, was to blame for her getting into the position. In *Hain Steamship Co.* v. *Board of Trade* (1), where both ships were negligent and equally to blame, this Court held that it was no answer to a claim made against the Crown under cl. 19 that there also existed a claim against the underwriters under cl. 18. Nothing of that kind has occurred here, where the only vessel at fault—not using that term as implying any negligence on the part of the owners or crew—was the *Clan Matheson*, her fault being that she suddenly left her proper position in the convoy and sheered across the bows of the *Western Front*. By that action she endangered herself and the other vessels under convoy and caused the collision, which in the circumstances was in no true sense of the expression a consequence of the warlike

(1) Ante, p. 534.

operation of the *Western Front*, but was the direct consequence of the action of the *Clan Matheson* herself. The present case differs altogether from such cases as *The Ardgantock* and the *Richard de Larrinaga—Attorney-General* v. *Ard Coasters.* (1) In each of these the collision was directly due to the warlike operation of the warships concerned, and I think that the result would have been the same if either or both of the merchant vessels had been disabled by a breakdown of their machinery or steering-gear. In both cases the merchant vessels had the right to be where they were when they were run down; they were sailing by themselves in the open sea and had no duty to any one to keep a direct course and not to sheer about as they chose. In those cases the collision was not caused by the merchantmen, but by the warship. To hold in this case that the collision was due to the warlike operation of the *Western Front* would in my opinion be to affirm the proposition that every collision with a ship when engaged in a warlike operation is a consequence of that warlike operation. In my judgment such a proposition is not sound. The authorities cited in support of it consisted mainly of the passages in Lord Dunedin's judgment in *Attorney-General* v. *Ard Coasters* (1), and in Lord Finlay's judgment in *Commonwealth Shipping Representative* v. *Peninsular and Oriental Branch Service* (*The Geelong*) (2), which have already been commented upon by Scrutton L.J., and I do not propose further to comment upon them. In my opinion neither of those learned Law Lords intended to lay down as a hard and fast general proposition that every loss occasioned by a collision with a ship whilst engaged in a warlike operation is a consequence of that warlike operation. I agree that the appeal should be dismissed.

GREER L.J. I regret to find myself in disagreement with Scrutton and Lawrence L.JJ. and Wright J. The logic of Wright J.'s judgment is attractive, but I prefer the view of the arbitrator. What we are concerned with is the true interpretation of clauses 18 and 19 of the charterparty.

(1) [1921] 2 A. C. 141.

(2) [1923] A. C. 191.

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[His Lordship read those clauses and continued:] The main fact we have to consider is whether or not the collision with the *Western Front* while she was in fact engaged in performing a warlike operation and navigating in the course of performing that operation right up to the moment when she made a hole in the *Clan Matheson*, was a consequence of the warlike operation at that moment being performed by the *Western Front*. The navigation of the *Western Front* at the moment when the *Clan Matheson* was holed was part of the warlike operation then being carried out. In this connection I call attention to the language of Lord Sumner in *Attorney-General* v. *Adelaide Steamship Co.* (1): "By admission the *Warilda's* operation was a warlike operation throughout, and as was the whole so were the parts. Steaming into the *Petingaudet* was one of those parts, and none the less so, whether it was due to mere misfortune, to error of judgment, or to negligent navigation." Substitute the *Clan Matheson* for the *Petingaudet*, the steaming into her was one of the parts of the warlike operation which was being carried out by the *Western Front*. In those circumstances it seems to me difficult to say that the collision which, if there had been no warlike operation going on, would have been a sea risk under cl. 18 is not taken out of that clause by the operation of the f.c. and s. clause referred to in cl. 19, "warranted free of all consequences of . . . . warlike operations." In my judgment the fact that the *Clan Matheson* by accident was unable to steer or was in a part of the ocean where she would not have been if she had been able to steer is not relevant to the question whether the collision was a consequence of the warlike operation carried out by the *Western Front*. The collision with the *Clan Matheson* when she was lawfully on the sea and in a situation into which she came without any blame attaching to those on board amounts in my view to a collision caused by a warlike operation of the vessel which collided with her. I think this is a much simpler proposition to apply to cases of this kind than that to be extracted from Wright J.'s

(1) [1923] A. C.292,, 301.

judgment. The view I have expressed has, I think, the support of the House of Lords in *Attorney-General* v. *Ard Coasters* (1), and I cannot myself distinguish that case from this in principle. Sailing without lights in that case was not the cause of the collision which took place there any more than sailing without the ability to steer in this case was not the cause of the collision. The cause of the collision was the action of the war vessel coming into contact with the other vessel in the position in which she was without any fault on her part. I also think that this case is governed by our decision in *Hain Steamship Co.* v. *Board of Trade* (2), where we held that the combined negligence of the two vessels did not prevent it being said that the collision was a consequence of an action of the war vessel which was one of the two colliding vessels. I also desire to call attention to the principle referred to in all the judgments in that case that where there are two causes co-operating at the same time it follows that the result of the two causes may be properly said to be the result of either of them, and if the collision was the result of the warlike operation which was being carried out by the *Western Front* it was none the less the result of that warlike operation because another cause also operated at the same time. I think this appeal should be allowed, but it is satisfactory to feel that whichever way of looking at this question is right the point will probably be settled by a higher tribunal.

Appeal dismissed.

Solicitors for appellants: *Ince, Colt, Ince & Roscoe.*
Solicitor for respondents: *Solicitor to Board of Trade.*

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(1) [1921] 2 A. C. 141.

(2) Ante, p. 534.

J. S. H.

1928
April 20, 24.

BROOKE *v.* BOOL.

Negligence—Act of one Person—Liability of another—Agency—Control of Proceedings—Joint Enterprise—Damage to Property from Failure to take Care.

The defendant let to the plaintiff a lock-up shop on the ground floor of a house adjoining that in which he himself resided. It was arranged that the defendant might enter the shop after the plaintiff had left it for the day to see that it was secure. One night a lodger informed the defendant that he thought he smelt gas coming from the shop, and the defendant thereupon entered the shop followed by the lodger. In the shop a gas pipe passed down a wall and terminated in a burner. The defendant, who was old, examined the lower part of the pipe with a naked light, and the lodger, who was much younger, then got upon the counter and examined the upper part of the pipe with a naked light, when an explosion occurred which did damage to the plaintiff's goods. The defendant admitted that he desired to examine the upper part of the pipe, and that he welcomed the lodger's help :—

Held, that the defendant was liable to the plaintiff for the damage done to her property by the negligent act of the lodger on any one of the following grounds :

(i.) that the act of the lodger was done by him as agent for the defendant.

(ii.) that that act was done in the course of proceedings of which the defendant had the control.

Wheatley v. *Patrick* (1837) 2 M. & W. 650 held applicable.

(iii.) that the act was done in pursuance of a concerted enterprise of the defendant and the lodger and was their joint tort.

The Koursk [1924] P. 140 applied.

(iv.) (per Talbot J.) that the defendant having undertaken the examination was under a duty to take reasonable care to avoid danger resulting from it, and that he could not escape liability for the consequences of his failure to do so by getting some one else to make the examination or part of it for him.

Appeal from Westminster County Court.

The defendant, Mr. John Bool, who was the owner of the premises, 86 Warwick Square, W., let a lock-up shop on the ground floor and the basement to the plaintiff, Mrs. Brooke, at a weekly rent. The plaintiff did not reside on the premises, but the defendant resided in adjoining premises between which and the shop there was internal communication by means of a door. It was arranged between the parties that the defendant should have a right to enter the shop at night after the plaintiff had gone in order to see that it was secure, and it was his practice to do so.

On May 3, 1927, about 10.30 P.M., a Mr. Morris, who occupied a lodging in the upper part of the premises in which the defendant resided, came down and told the defendant that he thought that he could smell gas coming from the plaintiff's shop. The defendant accordingly got up, opened the shop, and went in, followed by Morris. In the shop a gas pipe passed down one of the walls and terminated in a burner, the burner and the lower part of the pipe being accessible from the floor. The defendant examined the lower part of the pipe with a naked light, lit the burner, and, finding that nothing happened, turned the burner out again. Mr. Morris, who was much younger than the defendant, then got up on the counter and examined the upper part of the pipe, also by means of a naked light. A violent explosion followed, which, besides injuring Morris, did considerable damage to the shop and its contents, and thereby interfered for a time with the plaintiff's business.

The plaintiff brought the present action against the defendant, alleging that the loss which she had suffered was due to his negligence, and claiming damages.

At the trial the evidence of the plaintiff and that of the defendant were in conflict to some extent. The defendant, whose evidence the county court judge preferred to that of the plaintiff, stated that he had never had occasion to complain of escaping gas, that once or twice the plaintiff left the gas burning after she had gone from the shop for the night, and that he had turned it out at least once, but on neither occasion said anything to the plaintiff; that he went occasionally into the shop at night after she had left; that on May 3 he did not go into the shop before he went to bed about 10.30 P.M.; that in consequence of what Morris said he got up and went into the shop followed by Morris; that he had no light in his hand; that he smelt no gas, though he stood for a minute; that he took a box of matches, turned on the gas burner and lit it, and, on nothing happening, turned it out; that the gas burner had certainly been turned off before the plaintiff left; that he did not try the gas stove and nobody did; that Morris stood still doing nothing but watch the defendant; that Morris got up on the counter and, having some matches of his own, struck a light, when the explosion occurred; that he did not lend Morris any matches, or tell him to get on the counter, and that Morris had not struck any matches before getting on the counter; that he welcomed Morris's help to assist in finding out the cause of the gas escape and in putting it right; that he thought that Morris was wrong in doing what he did; that he said to Morris that perhaps there was an escape higher up; that Morris was about forty and he (defendant) was seventy-eight; that it was desirable in order to see if there was an escape higher up that some one should get on a chair or the counter; that when Morris got upon the counter he (defendant) thought he was going to see if there was an escape higher up; that he (defendant) wanted to find out whether there was an escape higher up; that he thought to himself "Let him find out"; that he did not say to Morris that he should not get on the counter; that getting on the counter was the only way to find whether there was an escape higher up; that after Morris had got on the counter he struck a match; that he said nothing to Morris; that it was all over in a second; that he supposed that Morris intended to find out whether there was a leak, and if so to stop it; and that they both wanted to do the same thing—namely, to stop the leak, if any.

The learned county court judge in giving judgment said that he found that the explosion was caused by the negligent act of Morris and was not caused directly or indirectly by any negligence on the part of the defendant; that he accepted as accurate the evidence of the defendant; that he thought that the plaintiff was a perfectly honest witness, but that he rejected her evidence wherever it contradicted or qualified the evidence of the defendant; that, that being so, he was of opinion that there was no evidence that entitled him to draw the inference that Morris was the agent of the defendant in doing the negligent act that he did, or to find that the defendant was responsible on the ground of joint enterprise, or joint negligence, or any other grounds, for the negligent act of Morris; that he had very grave doubts whether his opinion was correct; that if the Divisional Court should say that there was any evidence entitling him in law to draw that inference, or to find that the defendant was responsible on any ground for the negligent act of Morris, he should draw that inference, and he should find the defendant responsible; and that he gave judgment for the defendant with costs.

The plaintiff appealed.

Alexander Cairns for the plaintiff, appellant. The county court judge was wrong in holding that the defendant was not liable to the plaintiff for the damage done to her property by the act of Morris. The evidence showed that the circumstances in which the examination of the shop was made were such as rendered the defendant responsible for that act. For the purposes of the examination the relationship of principal and agent existed between the defendant and Morris. By arrangement between the plaintiff and the defendant, the latter had the right and the duty to enter the shop in the absence of the plaintiff for the purpose of looking after it, and on the occasion in question the defendant, if not expressly, at all events impliedly, requested or directed Morris to assist him as his agent in making the examination, and Morris did so. Morris did the tortious act which caused the damage within the scope of his agency, and the defendant is therefore responsible for it as his principal: see per Scrutton L.J. in *The Koursk.* (1) The defendant had control of the proceedings, and he cannot escape liability on the ground that the act which caused the damage was done by Morris whom he had called in to help him: *Wheatley* v. *Patrick* (2), and *Samson* v. *Aitchison.* (3) Further, in making the examination the defendant and Morris were engaged in concerted action in furtherance of a common design. Where two or more persons are so engaged and damage results from the wrongful act of one of them, that act is the joint tort of all of them and they are all responsible for it as joint tortfeasors: *The Koursk.* (1) Thus, partners are liable for the tort of one of their number where they all join in directing it or afterwards concur in it: *Petrie* v. *Lamont.* (2) Consequently, the defendant is responsible for the damage resulting from the act of Morris, which was done in pursuance of their common design.

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(1) [1924] P. 140, 155.

(2) 2 M. & W. 650.

(3) [1912] A. C. 844, 846.

G. M. Welsford (*J. D. Casswell* with him), for the defendant, respondent. The decision of the county court judge was right. There was no evidence to show that the circumstances were such as to render the defendant responsible for the act of Morris which caused the damage. The defendant did not either expressly or impliedly request or direct Morris to enter the shop and examine it in order to discover and prevent the escape of gas, nor was any agreement to do so ever entered into between them. The enterprise was that of Morris. He first noticed the smell of gas and proposed that the shop should be entered and examined, and, having obtained leave to enter it, he entered and examined it at his own hand. If the defendant did request or agree with Morris to enter and examine the shop, he did not request or agree with him to do so in a dangerous manner. The examination by the defendant himself of the lower part of the pipe with a match was not attended by any danger and caused no damage. The only dangerous act and the only act which caused any damage was that of Morris in striking a light in the upper part of the shop where the accumulation of gas was greatest, and to the doing of that act the defendant was no party. The tortious act of Morris which caused the damage was not done by him as agent for the defendant, because the relationship of principal and agent can only be created by agreement, and here there was no agreement that Morris should do that act as agent for the defendant. The defendant is not responsible for the tortious act of Morris which caused the damage on the ground that it was their joint tort for which they are liable as joint tortfeasors, because there was no agreement between them for common action in examining the upper part of the pipe with a naked light: see *The Koursk.* (1)

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(1) [1924] P. 140, 151, 155, 159.

(2) (1841) Car. & M. 93.

SALTER J. This is an appeal by the plaintiff from the learned judge of the Westminster County Court, who gave judgment with considerable doubt in favour of the defendant.

The defendant, accompanied by another man named Morris, went into premises in the occupation of the plaintiff and there they searched for a suspected escape of gas with naked lights, the result being that an explosion occurred. The question is whether or not the defendant is in law responsible to the plaintiff for damage which was done to her goods by the explosion. The learned judge was of opinion that there was not evidence from which he could find the facts necessary to entitle him in law to hold the defendant responsible, but he added that if in the opinion of this Court there was evidence on which he could find these facts then he should be taken to have found them in favour of the plaintiff. [His Lordship stated the facts which were not in dispute at the trial, and continued :] The evidence of the plaintiff was in conflict with that of the defendant on many points. The learned judge preferred the evidence of the defendant on these points, and I will therefore read the evidence of the defendant and take the facts there stated to have been found by the judge. [His Lordship read the evidence of the defendant, the substance of which is fully set out above, and, having also read the judgment of the county court judge, proceeded as follows :]

In my opinion there were here three distinct grounds on any of which it was competent in law for the learned judge to find that the defendant was responsible for the obviously gross recklessness of Morris in holding a naked light near to a place where he suspected that there might be an escape of gas.

In the first place, I think that there was evidence to show that Morris in doing what he did was acting as the agent of the defendant. The defendant desired to examine the gas pipe. He examined it himself so far as he could, and he did

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(1) [1924] P. 140, 155.

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so in a most reckless and dangerous way with a naked light. That examination, however, did not extend beyond the lower part of the pipe, and he wished to examine the upper part of it also. He was himself an old man, but he was accompanied by Morris, who was a much younger man, and in my opinion there was ample evidence that he impliedly invited and instructed Morris to get upon the counter and proceed with the examination when it was not convenient for him to continue it himself, and that Morris did what he did on the implied instructions of the defendant. There was evidence to show that the case came within the principle "Qui facit per alium facit per se," and on that first ground I think the learned judge could have found the defendant responsible.

Secondly, I think that the defendant could have been held responsible on the ground of the control which he had of the proceedings. It is necessary to bear in mind the difference between the position of the defendant and that of Morris in regard to the plaintiff. The defendant was on the plaintiff's premises lawfully at the request of the plaintiff, but Morris was there as a mere trespasser, unless the defendant had a right to invite him to come there and help. I think there was ample evidence on which the judge could find that the invitation extended by the plaintiff to the defendant to look after the shop gave him the power to invite some one to help him in an emergency of this kind. The defendant was in control of the enterprise. It was only by his permission and at his invitation that Morris was in the shop, and he had a right to require Morris to leave the shop at any moment. There are two cases which are perhaps sufficiently in point to be deserving of notice—namely, *Wheatley* v. *Patrick* (1) and *Samson* v. *Aitchison*. (2) They were both cases of street accident resulting from negligent driving. In each case the defendant was in possession and control of the vehicle that caused the accident, and was riding in it, and the person who drove and caused the accident was driving by the permission of the defendant, but was not the defendant's agent. In each case the defendant was held responsible to the person

(1) 2 M. & W. 650.

(2) [1912] A. C. 884.

injured for the negligence of the driver. The principle which was applied in these cases applies in this case also. The defendant, having the right to control Morris and having permitted and invited him to do what he did, was responsible for the consequences.

Thirdly, I think that the defendant was responsible on the ground that the enterprise in which he and Morris were engaged was the joint enterprise of both, and that the act which was the immediate cause of the explosion was their joint act done in pursuance of a concerted purpose. A case in which the question whether a particular tort is a joint tort or persons joint tortfeasors was that of *The Koursk*. (1) In that case there had been a collision between two vessels, the *Clan Chisholm* and the *Koursk*, resulting from separate acts of negligence on the part of those respectively in control of the vessels, and in consequence of that collision the *Clan Chisholm* ran into and sank a vessel called the *Itria*. The owners of the *Itria* brought an action against the owners of the *Clan Chisholm*, who limited their liability, and recovered judgment. They then brought an action against the owners of the *Koursk*, on whose behalf it was set up by way of defence that the tort which caused the damage was the joint tort of the owners of the *Clan Chisholm* and the owners of the *Koursk*, and that the judgment recovered in the earlier action was a bar to the later action. In the course of that case the Court of Appeal considered the law relating to joint torts and joint tortfeasors, but for the purposes of the present case I need only refer to two passages in the judgment of Scrutton L.J. The first of these, in which he discusses the true meaning of the expression joint tortfeasors, is as follows : "The substantial question in the present case is : What is meant by 'joint tortfeasors'? and one way of answering it is : 'Is the cause of action against them the same?' Certain classes of persons seem clearly to be 'joint tortfeasors.' The agent who commits a tort within the scope of his employment for his principal, and the principal ; the servant who commits a tort in the course of his employment, and his master ; two persons who agree on

(1) [1924] P. 140, 155.

common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another." (1) The present case falls within the third of the classes of cases there referred to. It was open to the learned judge to find that the entry of the defendant and Morris into the shop was preceded by a tacit agreement to examine the pipe. Both of them employed the same negligent means, and I think that what Morris did was done by him in concert with the defendant and in pursuance of their common enterprise. The other passage in the judgment of Scrutton L.J. is in these words: "I am of opinion that the definition in Clerk and Lindsell on Torts, 7th ed., p. 59, is much nearer the correct view: 'Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design' . . . 'but mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action to a common end.'" (2) That definition appears to me to apply to the relationship between the defendant and Morris in the present case, and on that third ground I think that the learned county court judge was entitled in law to find for the plaintiff.

The learned judge accepted the evidence of the defendant, and that evidence proves those facts which support a decision in favour of the plaintiff. He must therefore, according to his own statement, be taken to have found those facts. The result, in my opinion, is that the appeal should be allowed, and that the judgment in favour of the defendant should be set aside and judgment entered for the plaintiff.

TALBOT J. I am of the same opinion. I do not differ from the judgment which has just been delivered, or from any part of it. I think, however, that there is another ground upon which the liability of the defendant can be based.

The evidence in this case shows that the defendant was by arrangement with the plaintiff in charge at night of the shop occupied by her during business hours, in the sense that he had the right—possibly on occasion the duty—to enter it and see that it was safe. Morris, on the other hand, had no right to enter the shop and accordingly, when he noticed a smell of gas which he thought came from the shop, he went to the defendant for leave to go in and investigate. Thereupon the defendant got up and went with Morris into the shop, and there proceeded to ascertain, for the protection both of the plaintiff's premises and of his own, whether gas was escaping, by means of lighted matches. It is obvious that to examine a place in which an escape of gas is suspected is highly dangerous, unless proper care is taken; and that one of the necessary precautions against disaster is to avoid the use of a naked light. In my opinion the defendant, having undertaken this examination, was under a duty to take reasonable care to avoid danger resulting from it to the shop and its contents, and, if so, he cannot escape liability for the consequences of failure to discharge this duty by getting, as he did, some one to make the examination, or part of it, for him, whether that person is an agent, or a servant, or a contractor, or a mere voluntary helper. This is the principle of such cases as *Bower* v. *Peate* (1); *Black* v. *Christchurch Finance Co.* (2); *Hughes* v. *Percival* (3); *Hardaker* v. *Idle District Council* (4); and see the judgment of Lord Blackburn in *Dalton* v. *Angus.* (5) The principle is that if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owners of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise, to do it for him. A like principle applies to work done in or near a highway involving danger to those who use it: see e.g. *Holliday* v. *National Telephone Co.* (6) It appears to me therefore that the defendant is liable to the plaintiff for the damage caused to her property by the negligence of Morris, who by his authority continued the examination of the premises which the defendant had undertaken and begun. It is, I think, a reasonable inference from the evidence that the defendant thought that Morris would use lighted matches just as he had himself been doing; but it is quite immaterial. It was the defendant's duty to take care that the dangerous operation which he had undertaken was done safely, and he is as much liable for the carelessness of Morris in doing part of the work as he would have been if he had done it himself in the same way.

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(1) [1924] P. 140, 155.

(2) [1924] P. 140, 156.

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(1) (1876) 1 Q. B. D. 321.

(2) [1894] A. C. 48.

(3) (1883) 8 App. Cas. 443.

(4) [1896] 1 Q. B. 335.

(5) (1881) 6 App. Cas. 740, 829.

(6) [1899] 2 Q. B. 392.

Appeal allowed.

Solicitor for plaintiff: *F. H. Adams.*
Solicitors for defendant: *MacDonnell & Co.*

J. R.

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April 19, 20, 23, 24, 25, 26, 27; *May* 25.

LONDON COUNTY COUNCIL v. HACKNEY BOROUGH COUNCIL.

[1927. L. 1513.]

Local Government—Rates—Rateable Occupation—Non-payment—Distress Warrant—Jurisdiction of Justices—Replevin.

The defendants were the overseers of a parish in the Hackney Union. Within the parish was a building, the property in which was vested in the plaintiffs, managed by them in the early part of 1926 as an industrial school. After March, 1926, the building was no longer used as an industrial school and the plaintiffs removed their stores and furniture. The removal was completed in April, 1926, except that a caretaker was left in possession with a few articles of furniture for his use. In March, 1927, the plaintiffs decided to use the premises partly as an elementary school and partly for other purposes.

The defendants rated the plaintiffs in respect of the building for the two periods ending September 30, 1926, and March 31, 1927, and it was admitted that the rate was duly made and confirmed. The plaintiffs objected that the rate was invalid as there was no beneficial occupation by them. Upon their refusing to pay, the defendants complained to the justices, who issued a distress warrant. The defendants then seized a tramcar belonging to the plaintiffs. The plaintiffs did not appeal to quarter sessions, but took proceedings in replevin:—

Held, that the plaintiffs were not in beneficial occupation during the relevant period and were not rateable.

Held, also, that the jurisdiction of the justices to grant a distress warrant depended on the question of actual occupation within the parish and not on that of beneficial occupation, and that as the plaintiffs had failed to show that the distress was unlawful the action of replevin failed.

Birmingham Churchwardens v. *Shaw* (1849) 10 Q. B. 868; *Reg.* v. *Bradshaw* (1860) 29 L. J. (M. C.) 176; and *Mersey Docks and Harbour Board* v. *Cameron* (1861) 9 C. B. (N. S.) 812 followed on this point.

ACTION before Wright J. without a jury.

The following statement of the facts and points at issue between the parties is taken from the judgment of Wright J.:—

"The plaintiffs claim damages for the seizure by the defendants by their bailiff of a tramway car, the plaintiffs' property, under a distress warrant issued by justices for non-payment of rates. The plaintiffs, having taken proceedings in replevin and given a replevin bond in the usual form, claim a declaration that the distress was illegal, and also damages and cancellation of the bond. The defendants claim that the rates were duly levied and were in arrear, that the distress warrant was issued as on a determination by justices acting within their jurisdiction and that the question of the legality of the distress could not be raised in these proceedings.

The facts out of which the dispute arises are comparatively simple. The defendants were the overseers of the poor of the parish of St. John in the Hackney Union, in the county of London. Within their parish was a building called the Industrial School, Upton House, Urswick Road. Up to March 31, 1926, the plaintiffs, as the education authority, managed that building as an industrial school, the premises being vested in them in virtue of the Education (London) Act, 1903, and the Children Act, 1908. They had taken over the management of the industrial school from their predecessors, the London School Board. The Home Secretary, who was the central authority for industrial schools, had granted a certificate dated April 1, 1909, for the premises (the number of inmates being limited to 150) under the Children Act, 1908. Towards the end of 1925 the plaintiffs decided to close Upton House as an industrial school by reason of representations from the Home Secretary that, owing to the decrease in the number of committals to such schools, Upton House had become unnecessary. The Home Secretary had further declined to authorize a proposal by the plaintiffs to continue the building as a Central Industrial School. On November 21, 1925, the plaintiffs accordingly wrote to the Home Secretary resigning the certificate for the industrial school as from March 31, 1926, that being the close of their financial year. The Home Secretary, in reply, by a letter dated December 2, 1925, stated that six months' notice was necessary, and the school would accordingly cease to be a certified school on May 21, 1926, though it might be closed earlier. From the date of the Home Secretary's letter no further new boys could legally be received in the school, and from May 21, 1926, the premises could no longer be legally used as an industrial school. It was, in fact, closed as such on March 31, 1926.

The plaintiffs immediately proceeded to remove the furniture, stores, documents, and other equipment, the main removal being complete by April 10, 1926, and the residue by April 21, 1926. Some necessary furniture was, however, left in two rooms for a caretaker, and, in addition, two large wooden cupboards and an iron mangle were not taken away till the following September. The mangle was described as scrap iron and the cupboards could not be removed except by breaking up, when, as I infer from a minute, they were only fit for firewood. These articles were left in the building, not as valuable things needing a store place, but as things of so little value as scarcely to be worth removing. The caretaker, who was graded in the plaintiffs' service as a schoolkeeper, not because that truly described his functions because there was no school to keep, but because the plaintiffs had no grade of caretaker, was a mere caretaker. He kept the place clean, answered the door, noted defects that needed repairs, and generally looked after the vacant premises. He lived at first in two rooms near the main door. Later, when joined by his family, he made a home with them in what had been the infirmary. The only people who came

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were various workmen to repair defects in gas, plumbing, or roofing, and some architects and surveyors who came to take measurements and make plans with a view to the future use of the buildings. Gas, water, and electric light were left without being disconnected. Only the two former were used, and that only by the caretaker. The plaintiffs supplied the caretaker with coal.

After April, 1926, the future use to which the building might be put was in doubt. It was early suggested that it might be made into an elementary school; it necessitated large structural alterations to change a boarding school for 150 boys into a day school for 350. It was not till March 29, 1927, after many discussions, that it was finally decided to turn one part of the premises into an elementary school for 350 boys, and another part into offices for use by the plaintiffs as the education authority and also to build an open air school in the grounds. This last scheme involved entirely new buildings; the two former schemes involved very expensive structural alterations. The whole work, which commenced after April, 1927, and has only now, in May, 1928, been completed, cost about 12,000*l.* The buildings are now ready for use for their new purposes. It was only after considerable doubt and discussion that this plan was decided on at the end of March, 1927. The plaintiffs were free to use the buildings for any of their purposes, or to sell them. Their valuer gave an estimate of value for the purposes of sale. There was some opposition in the educational committees to the idea of converting them in part into elementary school premises, since they would be less efficient, though less costly, than a newly erected school building. They might have been pulled down and rebuilt as a school, or a housing scheme might have been carried out.

The rates in question duly appeared, as assessed on the premises, in the rate book, for the periods ending September 30, 1926, and March 31, 1927. It is not disputed by the plaintiffs that the rate was, as regards form, duly made and confirmed. It is not disputed that the plaintiffs were in occupation during the material period of the premises. It is disputed that

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they were in beneficial occupation. It is accordingly disputed that they were duly assessed. The plaintiffs contend that there was no jurisdiction to rate them at all, as the only jurisdiction to rate is on the ground of beneficial occupation. The plaintiffs did not appeal against the rate, but they refused to pay. The defendants in due course lodged a complaint in respect of non-payment before the justices by a summons against the plaintiffs issued on May 14, 1927, which came on for hearing before the justices on June 16, 1927. The justices decided to issue the distress warrant. The plaintiffs did not ask for a special case for the opinion of the High Court. The distress was levied on a tramway car, the property of the plaintiffs, who did not appeal against the distress to quarter sessions but took proceedings in replevin, which have resulted in this action."

Konstam K.C. and *E. H. Tindal Atkinson* for the plaintiffs.

Scholefield K.C. and *Hubert Hull* for the defendants.

Cur. adv. vult.

May 25. WRIGHT J. read the following judgment: [Statement of facts as above.] The main questions are, shortly: (1.) Was there beneficial occupation by the plaintiffs of the premises during the relevant period? (2.) If not, are the plaintiffs entitled to take these proceedings? The defendants not only say that there was beneficial occupation, but they further say that if there was not, the plaintiffs could only raise that issue by appeal from the rate in the first instance to quarter sessions, or, it may be, on the complaint before the justices, who were willing to state a case for the High Court, or by appeal to quarter sessions against the distress. The plaintiffs reply that, as they had no beneficial occupation, there was no jurisdiction to rate them and any proceedings before justices or quarter sessions were coram non judice and of no effect, so that the seizure under the distress warrant was illegal. Both these issues have been fully argued before me, and I shall give judgment on each.

Mr. Konstam took, but not very strenuously, a further point—namely, that the rate was in any case bad on its face, because the assessment was made on "the Industrial School, Upton House, Urswick Road." The defendants' answer was that the description was a correct description of the actual premises, even if the use of the building as an industrial school had been discontinued. I think that answer is sound.

I shall deal first with the question whether the occupation by the plaintiffs of the premises was beneficial during the year of assessment. It is now clear law that "beneficial" in this connection does not connote pecuniary profit. It is enough in the case of a public body, such as the plaintiffs, that the occupation is of benefit or advantage to them in the performance of their public duties. Nor, in these proceedings, can any question be raised of the quantum of benefit if there be any benefit. Any question of quantum can only be raised on appeal against the rate. That the plaintiffs are in occupation is not disputed. They are owners of the premises and no one else is in occupation. By their caretaker they are in visible occupation. But occupation is not enough. The essentials to constitute rateability are thus stated by Lord Atkinson in *Liverpool Corporation* v. *Chorley Union Assessment Committee* (1): "(1.) Does the appellant occupy this cemetery"—that being the locus in question—"for which he is rated? (2.) If he does, is his occupation a thing of value?" To make the plaintiffs rateable both these questions must be answered, mutatis mutandis, in the affirmative. It is the second question which is now being considered.

The main contention of Mr. Scholefield is that the plaintiffs had beneficial occupation because they were keeping the premises in reserve for the purposes of their undertaking, and holding them available for use for any of their purposes whenever they should require them, and had at no time abandoned the intention to use them for some educational purposes, even if not the same as those for which they had used them previously. It was contended that with regard to vacant buildings the issue of rateability must be determined by considering what the owner's intention was, and the relevant intention of the plaintiffs in this case in the rating period in question was, as the contention ran, to use the premises in the future for some purpose of their undertaking. To escape rateability, it was contended, the plaintiffs must show that in the material period they had decided completely to abandon any user of the premises, as, for instance, by definitely deciding to let or sell. It was also said that the plaintiffs were putting the premises to the only use which they had intended or contemplated in the relevant period—namely, to keep them in reserve and available for any purpose when required.

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(1) [1913] A. C. 197, 208.

Apart from principle and authority to which I shall refer, I do not think that these contentions are in consonance with the facts. The premises were before April, 1926, used as an industrial school and not otherwise. They were only capable rebus sic stantibus of being so used, and no other user had been intended or contemplated. They could not any longer, legally, after April, 1926, be so used, nor had the plaintiffs any longer any intention of so using them. They could not be used for any other purpose, educational or otherwise, without elaborate alterations incapable of being completed within the year. The original user having been finally abandoned, no fresh plan of enjoyment of the premises was decided on till March 29, 1927, when a plan was formed which could only be put into service after elaborate structural changes. In the meantime the plaintiffs could well have sold or let the premises, or have decided to prepare to turn them to uses other than educational.

I think that the only conclusion on these facts is that the premises in the relevant period were neither being used nor capable of being used for any beneficial purpose of the plaintiffs but were simply vacant premises. They were not being kept in reserve in the same sense as a furnished house, ready for the owner's occupation at any time, is kept in reserve, or as a warehouse, empty indeed, but ready at any time to receive goods for storage, is kept in reserve, as in *Rex* v. *Melladew* (1), or as the empty warehouse kept by the

(1) [1907] 1 K. B. 192.

owners "as a 'standby' for use at any moment when the exigencies of their business might make it desirable to so use it, and in readiness for such use," was kept in reserve, as in *Borwick* v. *Southwark Corporation.* (1) These seem to be the strongest authorities relied on by the defendants, but they appear to be clearly distinguishable from this case. In those cases, the premises, without alteration, were kept ready for a definite employment, and this was what was contemplated and intended and was the reason why they were acquired. In the present case there was no employment for which the premises were suited. Their future employment was uncertain and under deliberation and they could not be made ready for any probable prospective employment without elaborate re-equipment.

The principles applicable to vacant buildings or houses have been discussed in certain cases, not always very clearly. Lord Atkinson, following Lord Halsbury, put the matter thus in *Liverpool Corporation* v. *Chorley Union Assessment Committee* (2): "When the statute, therefore, enacts that the occupier of a house should be rated, it must mean that the person to be rated shall occupy the house *as a house;* that is, that he shall use the house for the purpose of living in it, or sojourning in it, or working in it, keeping animals in it, storing other chattels in it, or using it for some such other purpose as houses may reasonably be devoted to; and that, as a vacant house is not used for any of these purposes, it is not occupied as a house within the meaning of the statute." It is clear that in this sense there was no user by the plaintiffs of their premises in the material period. In *Rex* v. *Melladew* (3) Farwell L.J. puts the question thus: "The test, in a case like the present, of business premises, appears to me to be, Has the person to be rated such use of the tenement as the nature of the tenement and of the business connected with it renders it reasonable to infer was fairly within his contemplation in taking or retaining it?" Buckley L.J., in *Liverpool Corporation* v. *Chorley Union*

(1) [1909] 1 K. B. 78.
(2) [1913] A. C. 197, 211.
(3) [1907] 1 K. B. 192, 203.

Assessment Committee (1) in the Court of Appeal, thus states the problem: "Are the corporation using the land for the purpose of their business or adventure and deriving benefit from it?" Such questions, I think, could only here be answered in a sense favourable to the plaintiffs' case.

Nor can the defendants derive any support for their contentions from cases of seasonal trades where in any year the profits can only be made during a short time and at the expense of a period of dormancy or vacancy, which however is a necessary condition of the fruitful or profitable period, such as the case of a shop in a seaside watering place: *Southend Corporation* v. *White* (2); or a boarding house in a seaside town with a short season: *Gage* v. *Wren* (3), where the vacancy of the premises during the idle season, both of residents and furniture, did not afford a relief from rateability. In the present case the period of vacancy follows on a complete cessation of the original user and an absence at the relevant times of any intended or contemplated new employment.

The relevant intention must, I think, have regard to employment of the premises in the rating year, and to an employment for which they were suited or readily capable of being suited in their then actual condition. This was the ground of the decision in *Bootle Overseers* v. *Liverpool Warehousing Co.* (4), which turned on a finding that in the rating year there was no intention to use the premises. This is quite different from keeping premises definitely and intentionally in reserve for purposes for which they are prepared. In such a case the contemplated and intended user is being enjoyed, just as the intended user is being enjoyed under different circumstances in *Liverpool Corporation* v. *Chorley Union Assessment Committee.* (5) Mr. Scholefield also relied on the case of *Hackney Borough Council* v. *Metropolitan Asylums Board* (6), but in that case beneficial occupation was held to be established from "an accumulation of facts," each of such facts being "one of small but not negligible moment." I cannot deduce from that case any guidance for the present case, which, as I regard the facts, is simply the case of an owner who has abandoned the user of certain premises in the way for which they had been acquired and equipped and has not decided as to their future disposal at any relevant time.

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(1) [1912] 1 K. B. 270, 288.

(2) (1900) 83 L. T. 408; 17 Times L. R. 5.

(3) (1902) 87 L. T. 271; 18 Times L. R. 699.

(4) (1901) 85 L. T. 45.

(5) [1913] A. C. 197, 211.

(6) (1924) 131 L. T. 136; 40 Times L. R. 645.

I shall consider next the contention that there is beneficial occupation (*a*) because of the presence of the caretaker, and (*b*) because of the cupboards and mangle left on the premises till September, 1926. In my judgment, neither of these facts constitutes any evidence of beneficial occupation in the circumstances of this case. The caretaker may be necessary to protect the premises from injury and damage and to facilitate the entry of the owners or of any persons calling on their behalf. But rating is on the occupier, that is on the beneficial occupier and not on the owner, and I do not think that the caretaker in this case fulfilled any functions towards the beneficial user or enjoyment of the premises during the year in question, however useful he may have been in safeguarding the interests of the plaintiffs as owners. It has been held that a mere caretaker does not render a house liable to be rated: *North Dublin Union* v. *Scott* (1); *Rex* v. *Morgan*. (2) I may also refer to the observation of Lord Alverstone C.J. in *Bertie* v. *Walthamstow Overseers*. (3) If a man is a mere caretaker put in to preserve and guard the house from depredation—in other words, to take care of it—the master is not liable to be rated, because the master has no beneficial occupation. In the case where it was held that the presence of the caretaker constituted beneficial occupation by the owner, since the caretaker himself could not be rated as occupier: *Yates* v. *Chorlton-on-Medlock Union* (4), either the caretaker was cultivating the ground and benefit was being derived therefrom: *Hicks* v. *Dunstable Overseers* (5), or the caretaker was rendering valuable services

(1) (1850) 1 Ir. C. L. R. 76.
(2) (1834) 2 Ad. & E. 618.
(3) (1904) 68 J. P. 545, 546.
(4) (1883) 47 J. P. 630.
(5) (1883) 48 J. P. 326.

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in other respects to the owner: *Bertie* v. *Walthamstow Overseers.* (1) In these cases it was held that there was beneficial occupation, but it has not been so held where the caretaker was merely a caretaker, as I find him to have been in this case.

Nor is the presence till September, 1926, of the two cupboards and the mangle on the premises any evidence, in my opinion, of beneficial occupation. Leaving furniture in a house may render it rateable, as stated by Lush J. in *Reg.* v. *St. Pancras Assessment Committee* (2): "The owner of a vacant house . . . . is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year." The reason for this is not that it is simply a storehouse for the furniture, but that the owner is having such beneficial enjoyment of it as he desires. It is ready for him whenever he wants to reside in it. No doubt in such a case it might be also regarded as the subject of beneficial occupation as a storehouse for the furniture which must be stored and safeguarded somewhere. On these principles, in *Staley* v. *Castleton Overseers* (3), it was held in respect of a cotton mill, which owing to bad trade it did not pay to work: "Regarding the mill merely as a storehouse for valuable machinery which it is important to keep in a state fit for use, it is obviously property for which some persons would give a rent"; and similarly, in *Harter* v. *Salford Overseers* (4), a mill not being worked was held rateable as a warehouse for the machinery necessary for its working when required. These cases, in my opinion, afford no analogy to the present case where the chattels, as I find the facts, were kept on the premises simply because they were of no practical importance and though they had to be removed before any valuable use could be had of the premises, were not worth the trouble of removing for their own sake. It seems to me to be fallacious to say that these buildings were beneficially occupied in any amount, merely because

(1) (1904) 68 J. P. 545, 546.

(2) (1877) 2 Q. B. D. 581, 588.

(3) (1864) 5 B. & S. 505, 515.

(4) (1865) 6 B. & S. 591.

these unwieldy and obsolete articles were not taken away earlier.

I ought in passing to notice Mr. Scholefield's argument, not perhaps strenuously pressed, that there was some beneficial occupation because the premises were repaired from time to time and because the architects and surveyors of the plaintiffs visited them. The former is merely a matter of the preservation of the premises for the plaintiffs as owners and not any act of beneficial occupation. The latter is of the same character, and in any case has no reference to actual beneficial occupation, but only to future or prospective valuable user.

In my judgment, for the above reasons, the plaintiffs were not beneficial occupiers and were not rateable in the year in question, but that still leaves the further question whether they can succeed in this action. The action being an action of replevin, they have to show that the distress was unlawful, which involves that the warrant issued by the justices was issued without jurisdiction. Such actions have been maintained where rates have been levied on premises which a person did not occupy, or which were outside the period, as in *Milward* v. *Caffin* (1) and *Bristol Guardians* v. *Wait* (2), or where the rate was bad on its face. A more modern instance where a claim in replevin succeeded, on the ground that the plaintiffs were not occupiers but licensees, is *Rochdale Canal Co.* v. *Brewster.* (3) The reason is that in such a case both the allowance of the rate by the justices and its confirmation by quarter sessions on appeal, if appeal be taken, and the proceedings before the justices who grant the distress warrant are proceedings coram non judice and are void of legal effect.

Mr. Konstam has however contended that the basis of the justices' jurisdiction depends not on occupation, that is actual occupation, but on beneficial occupation, and hence that a distress warrant against an occupier who is not a beneficial occupier is without jurisdiction because the proceedings are coram non judice, and hence, the warrant being

(1) (1779) 2 W. Bl. 1330.

(2) (1834) 1 Ad. & E. 264.

(3) [1894] 2 Q. B. 852.

without jurisdiction and bad, the action in replevin will lie. He admits that no authority in terms justifies this contention and there are decisions and dicta to the contrary effect, but he prays in support of his argument *Mersey Docks and Harbour Board* v. *Cameron* (1), where, in an action for replevin, the House of Lords heard and determined the question whether the occupiers were beneficial occupiers, and he argues that as jurisdiction cannot be given by consent, the House of Lords must have assumed that this issue of beneficial occupation was a relevant issue to be determined where the validity of a distress warrant was in question. I do not think that the latter contention is sound. What happened in that case was that the point was waived by the overseers in order to obtain the decision of the House of Lords on so vital a question of principle as that case raised. Their Lordships do not mention the question, but it is thus stated in the opinion of the majority of the judges, read by Blackburn J. in the House of Lords: "The question whether replevin lies has been waived, and therefore it is not necessary farther to consider whether in such a case the more proper expression would be that the person in possession of the property was not an occupier at all within the meaning of the Statute of Elizabeth, so that the overseer had no jurisdiction to make the rate, and consequently that the levying of it might be resisted in replevin or trespass; or whether, as seems to have been the opinion of the Court of Queen's Bench in *Birmingham Overseers* v. *Shaw* (2) and *Reg.* v. *Bradshaw* (3), he is an occupier, whom, as such, the overseers have jurisdiction to tax, though on appeal the rate must be reduced to nothing. Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the Bar),

(1) 9 C. B. (N. S.) 812; (1864) 11 H. L. C. 443, 461.

(2) 10 Q. B. 868.

(3) 29 L. J. (M. C.) 176.

it is clear that a beneficial occupation is essential as the foundation of the rate." I confess I feel some doubt how Blackburn J. would have answered the question he so propounds. But in the Court of Common Pleas (1) judgment was given by the majority of the Court (Erle C.J., Williams J. and Keating J., Willes J. doubting), against the plaintiffs, not on the merits of the case, but simply on the ground that replevin did not lie, where the only question was whether the occupation was or was not beneficial. They held themselves bound by the principles enunciated in the earlier decisions of *Birmingham Overseers* v. *Shaw* (2) and *Reg.* v. *Bradshaw* (3), deferring to them as a matter of duty, and leaving all further consideration for the Court of Error.

The principle of these cases (which were cases of mandamus, not of replevin) was thus stated in *Reg.* v. *Bradshaw* (3): "*Birmingham Overseers* v. *Shaw* (2) adopts and confirms the case of *Marshall* v. *Pitman* (4) which establishes the principle, that where there is visible occupation of property within the rating parish, and the party rated objects that although he is in the visible occupation of the premises, his occupation is altogether devoid of benefit to himself—that is matter for which he must seek his remedy by appeal to the Quarter Sessions." I think that, as a judge of first instance, I am bound by this decision. Mr. Konstam, however, contends that, though there has been no case of an action of replevin where, there being occupation there was no beneficial occupation, yet I ought not to follow the case of *Mersey Docks and Harbour Board* v. *Cameron* (5), because by subsequent cases the jurisdiction of magistrates, in considering questions on proceedings for distress warrants, has been enlarged. In *Reg.* v. *Bradshaw* (3) it was held that the duties of magistrates were ministerial, and that when called upon to enforce a rate good on the face of it they had no jurisdiction to go into the question of beneficial occupation. It is clear that that view is no longer accepted or acted upon. It was held in the case of *Fourth City Mutual Building Society* v. *East Ham Churchwardens and Overseers* (1) that justices in proceedings for a distress warrant were authorized to inquire into objections and state a case for the opinion of the High Court, so that their duties were not simply ministerial. The power to state a case depended on the Summary Jurisdiction Act, 1884. Cases have accordingly been thereafter from time to time stated by justices, and their jurisdiction was thus defined by Atkin J. (giving the judgment of himself and Bray J. in *Whenman* v. *Clark* (2)). "In *Reg.* v. *Hannam* (3) Lord Esher and Cotton L.J. laid down a rule that where there can be an appeal to quarter sessions the justices have only to enforce the rate, and are bound to assume the rate to be good if the property is within the district. This was in the year 1886, and if this rule had been uniformly acted on since we should have been bound to follow it, but the cases which I have mentioned show that this is not so, and that other exceptions have been made, and it is open to this Court to lay down a general rule which will embrace these exceptions; and we think the rule to be laid down is that the justices have jurisdiction if the question is whether the defendant ought to have been rated at all, or if at all, for the full rateable value." That was on the hearing of an application for a distress warrant for non-payment of rate. In the same case, in the Court of Appeal (4), that rule was adopted by Swinfen Eady L.J., and Pickford L.J., with the qualification "where the material facts are not really in dispute." I gather that in such cases as the present there is seldom any real dispute on the material facts. Notwithstanding some doubts expressed obiter in *Shillito* v. *Hinchliffe* (5), the rule thus expressed is acted upon, as for instance in *Hackney Borough Council* v. *Metropolitan Asylums Board* (6), where the case was stated by the justices on the question of beneficial occupation.

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(1) 9 C. B. (N. S.) 812; 11 H. L. C. 443, 461.

(2) 10 Q. B. 868.

(3) 29 L. J. (M. C.) 176.

(4) (1833) 9 Bing. 595.

(5) 9 C. B. (N. S.) 812.

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(1) [1892] 1 Q. B. 661.

(2) [1915] 1 K. B. 548, 559; [1916] 1 K. B. 94.

(3) (1886) 2 Times L. R. 234.

(4) [1915] 1 K. B. 548; [1916] 1 K. B. 94.

(5) [1922] 2 K. B. 236.

(6) (1923) 40 Times L. R. 645.

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But though the practice, or, as I think, the law as to the scope of the justices' jurisdiction in such cases has been thus extended since *Reg.* v. *Bradshaw* (1), I do not think that this extension affects the law established by the authorities cited as to the foundation or origin of their jurisdiction, which I feel bound to hold still depends simply on occupation within the parish, and not on beneficial occupation. What gives jurisdiction is a different matter from the scope of jurisdiction once it is given. As I am deciding the matter simply on the basis of authority, I do not consider it necessary or desirable to consider it further, or to discuss further the difficult question of precisely defining the principles necessary to ascertain, in the case of inferior tribunals, what goes to absence of jurisdiction on the one hand and erroneous exercise of jurisdiction on the other, or to discuss the balance of expediency in procedure having regard to the complicated inter-relationship between justices, quarter sessions on appeal, and the High Court on mandamus and similar proceedings and case stated. It is enough that the defendants rely on the point which I have been considering and in my opinion it is covered by authority binding on me. I, therefore, hold that the claim in replevin is not maintainable.

Judgment for defendants.

Solicitor for plaintiffs: *P. Bullivant.*
Solicitor for defendants: *R. H. R. Tee.*

(1) 29 L. J. (M. C.) 176.

F. P. F.

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June 12, 13, 14, 15, 20.

JAMES FINLAY AND COMPANY, LIMITED *v.* N. V. KWIK HOO TONG HANDEL MAATSCHAPPIJ.

[1925. J. 3045.]

Sale of Goods—C.I.F. Contract—Delivery in specified Months—Bill of Lading—Date of Shipment stated incorrectly—Duty of Seller to tender to Buyer Bill of Lading in which Date of Shipment is stated correctly—Right of Buyer—Measure of Damages.

The seller under a c.i.f. contract is bound to procure and tender to the buyer a bill of lading which shall correctly state the date of shipment.

Where the seller under a c.i.f. contract, under which delivery is to be made in a specified month, tenders to the buyer a bill of lading in which the date of shipment is incorrectly stated, the shipment in fact not taking place in the month specified in the contract, the buyer, being deprived of his right to reject the tender of documents, is entitled to damages for the breach by the seller of his obligation to deliver a correct bill of lading, the measure of which is the difference between the market price and the contract price of the goods sold where the contract price is higher than the market price.

A plaintiff's duty to minimize damage is limited to doing what is reasonable in all the facts of the case, the onus of showing a breach of that duty being on the defendant.

ACTION tried before Wright J. in the Commercial List.

The plaintiffs were a company carrying on business as merchants in India and elsewhere with a house in London, and the defendants were merchants in Java dealing in the sale and shipment of sugar.

The plaintiffs claimed damages for the breach of three contracts made with the defendants in January and February, 1920, for the sale of sugar. By each of these contracts the defendants sold to the plaintiffs 300 tons of Java sugar at various specified prices c.i.f. Bombay. Shipment was to be made during the months of July, August and September, 1920; 100 tons of sugar were to be delivered under each of the three contracts during each of the three months. The contracts provided for the opening of a credit by the buyers on their London house, which credit was to be confirmed by the bank if necessary, and the sellers were to draw thereunder in three months sight drafts, for the due payment of which drafts at maturity the buyers remained responsible.

Each of the contracts also contained an arbitration clause, which provided that "Any dispute arising out of this contract is to be settled by arbitration of London brokers in the usual manner, and this submission may be made a rule of the High Court of Justice or any division thereof."

No question arose as to the shipments during July and August, the dispute in the present case arising with regard to that portion of the three contracts which provided for the shipment during September of 100 tons of sugar under each of the three contracts. The defendants, who had duly delivered the July and August instalments, arranged that the 300 tons, which under the three contracts had to be shipped in September, should be shipped from a port called Cheribon, in Java, by the steamship *Sealda,* a vessel belonging to the British India Steam Navigation Company. That vessel arrived at Cheribon on September 30, 1920, and sailed on October 3. Wright J. accepted the evidence of the captain that no cargo was loaded until the morning of October 1, and he accordingly found as a fact that the 300 tons of sugar which were tendered by the defendants under the contracts as being a September shipment, were not a September shipment, and therefore were not in accordance with the contracts.

The bills of lading in respect of these 300 tons of sugar were signed by the ship's agents, who had an office at Samarang, but not at Cheribon. They were dated at Samarang, September 30, 1920. They purported to state that the 300 tons of sugar were "shipped in good order and condition by" the defendants "on board the *Sealda* lying at the port of Cheribon for carriage to Bombay." Wright J. said that as he was satisfied that the shipment did not take place until after September 30, he could only regard those documents as false, incorrect and inaccurate. The *Sealda* arrived at Bombay on November 9, and finished discharging her cargo on November 15.

The plaintiffs at the request of the defendants cabled a credit at the end of September. Drafts dated September 30, 1920, addressed to the plaintiffs in London and payable to the Hong Kong and Shanghai Banking Corporation, were then drawn by the defendants for the contract price of the sugar, payable three months after sight. These drafts, to which one set of shipping documents were attached, were sent to London and were duly presented by the Hong Kong and Shanghai Banking Corporation to the plaintiffs' house in London and were accepted on November 12, 1920, and payment therefore became due on February 15, 1921. The other copies of the shipping documents were sent to the plaintiffs' house at Bombay in order to enable them to obtain delivery of the sugar on arrival.

The plaintiffs, in the course of their business as merchants, made three sub-contracts for the sale to certain buyers at Bombay of a portion of the sugar which they had bought from the defendants. These sub-contracts provided for shipment in July, August and September, 1920, c.i.f. Bombay, at prices slightly higher than in the contracts between the plaintiffs and the defendants. Each of those sub-contracts contained a clause (No. 7) which provided that "The bill or bills of lading shall be conclusive evidence of the date of shipment." The plaintiffs appropriated to the September shipment due under those sub-contracts 150 tons of the sugar which was due by the *Sealda* in respect of the September shipment under the three contracts between the defendants and the plaintiffs. The sub-buyers however refused to take delivery of the 150 tons of sugar ex the *Sealda*, alleging that it was not a September shipment. The market price for sugar had fallen considerably. The plaintiffs, after unsuccessfully pressing the sub-buyers to take delivery, eventually sold the sugar by auction in December, 1920, the amount realized by the sale being very substantially less than the contract price payable under the contracts between the plaintiffs and the defendants. Wright J. accepted the evidence of the plaintiffs' manager at Bombay that the amount realized at the auction represented the fair market price of the sugar.

The plaintiffs, having ascertained that the shipment by the *Sealda* was not a September shipment, in February, 1922, served upon the defendants a notice requiring them to proceed to arbitration under the arbitration clause in the contracts. The arbitration resulted in an award which was set aside by the Divisional Court in November, 1923. Thereupon the plaintiffs and the defendants agreed that the question whether the defendants had fulfilled the contracts by making a good tender or whether the plaintiffs were entitled to damages for breach of contract should be determined by an action in the Courts, the arbitration clause being waived. That action was brought in the first instance by the plaintiffs in respect only of the 150 tons of sugar which was the subject-matter of the sub-contracts and not of the whole of the 300 tons constituting the September shipment under the three contracts between the plaintiffs and the defendants. After the writ was issued the plaintiffs desired to include in the action a claim in respect of a further 100 tons of sugar, and they sought to obtain leave to serve an amended pleading out of the jurisdiction. This led to prolonged litigation between the parties, the case ultimately going to the House of Lords (1), where the House of Lords affirmed the decision of the Court of Appeal, giving leave to serve the amended pleading out of the jurisdiction, and held that the contracts in question must be construed according to English law.

The defendants alleged a custom as a defence to the action which necessitated a commission to Java, and caused considerable delay in the trial of the action. The custom, as finally pleaded, was that " by the custom of the port of loading should a steamer which has contracted to take cargo for shipment during a particular month arrive at the loading port at which such cargo has been declared ready for shipment by the shippers at any time during the month and the cargo to be loaded on such steamer is ready in lighters during the month and loading takes place during a reasonable time after the vessel's arrival, then, notwithstanding that such cargo may not be loaded during the contracted month, it is accepted that the shipper fulfils his engagement in respect to the shipment period, and therefore all bills of lading for

(1) [1927] A. C. 604.

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the cargo may bear the date of the month on the contract, notwithstanding the fact that the steamer may not have loaded during such month." It was also alleged that "by the law of Java the said custom is binding on the plaintiffs." Wright J. held on the evidence that the alleged custom had not been proved, and that therefore the defence based on such custom had not been made out. He also held that in any event such custom would not by English law receive legal effect as being contrary to the express terms of the contracts. Further, it had not been proved in fact that the 300 tons of sugar were in lighters at any time in the month of September. It also appeared that the practice or custom had been abolished or discontinued some time in 1921, because the banks had protested against it. Wright J. therefore held that there was a default on the part of the defendants, because they had not fulfilled their contract.

Le Quesne K.C. and *D. B. Somervell* for the plaintiffs. The plaintiffs are entitled to recover back from the defendants as money paid under a mistake of fact the amount which they paid to the defendants for the sugar which the defendants shipped on board the *Sealda* in purported performance of their obligation under their three contracts with the plaintiffs to make shipment in September. The plaintiffs paid on documents presented by the defendants which contained untrue statements as to the date of shipment, and therefore the plaintiffs' mistake of fact was induced by the defendants. The fact that the plaintiffs cannot now return the sugar will not prevent them from recovering the amount they paid to the defendants less the actual value of the sugar which they received: *Durrant* v. *Ecclesiastical Commissioners* (1); Smith's Leading Cases, 12th ed., vol. ii., p. 430. In the alternative, the plaintiffs are entitled to recover from the defendants the difference between the contract price for the sugar and the market price, which was the amount actually realized on the sale of the sugar by auction. There is an implied term in every contract of sale that the date

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(1) (1880) 6 Q. B. D. 234.

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of shipment set out in a bill of lading shall be the correct date of shipment: see *United Baltic Corporation* v. *Burgett & Newsam* (1) and *Suzuki & Co.* v. *Burgett & Newsam.* (2) In the further alternative, the plaintiffs are entitled to recover the difference between the sum which they would have received from their sub-buyers if the sub-contracts had been carried out and the sum which the sugar which the plaintiffs delivered as being a September shipment actually realized when sold by auction. When the defendants broke their contract by failing to make delivery of a September shipment the plaintiffs were unable to obtain other sugar of the contract description in the market in order to fulfil their contracts with their sub-buyers. The plaintiffs were not entitled to say that their sub-buyers were bound, by reason of clause 7 of the sub-contracts, to take delivery of the sugar whatever the actual date on which it was shipped. That clause does not compel a buyer to accept something which he has not bought: *Vigers Brothers* v. *Sanderson Brothers.* (3)

Jowitt K.C. and *van den Berg* for the defendants. The plaintiffs are only entitled to recover nominal damages. The plaintiffs are not entitled to recover damages for their loss of profit on their sub-sales, because they could have compelled their sub-buyers to accept the sugar by reason of clause 7 of the sub-sales, which makes the bill of lading conclusive evidence of the date of shipment. The sub-buyers therefore could not have refused to carry out their contracts on the ground that the date of shipment stated in the bill of lading was not the correct date; they could only avoid their liability under the sub-contracts by proving fraud on the part of the plaintiffs, and there has never been any suggestion of fraud. The insertion of a clause in a contract providing that a statement in a bill of lading shall be conclusive evidence as to the fact contained in that statement is very usual, the object being to prevent disputes with regard to that fact: *Bowes* v. *Shand* (4); *Lishman*

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(1) (1921) 8 Ll. L. Rep. 190.

(2) (1922) 10 Ll. L. Rep. 223, 225.

(3) [1901] 1 K. B. 608, 610, 611.

(4) (1877) 2 App. Cas. 455.

v. *Christie & Co.* (1); Scrutton on Charterparties, 12th ed., p. 73. A party to a contract is bound to mitigate his damages if he can do so by asserting his rights against other parties. As the plaintiffs did not enforce their rights against their sub-buyers they brought their loss of profits upon themselves. The defendants did not know at the time of the sale that the plaintiffs were contemplating reselling the sugar to other buyers, and therefore the plaintiffs cannot recover their loss of profit from the defendants. As the plaintiffs accepted the sugar and sold it they cannot reject it. The true principle on which the damages should be assessed is stated in the judgment of McCardie J. in *Taylor & Sons* v. *Bank of Athens* (2)—namely, that if the value of the goods as received by the buyers are in the circumstances the same as it would have been if the shipment had been made in accordance with the contract the buyers are entitled to nominal damages only. It is immaterial whether the shipment took place on September 30 or on October 2. In either case the value of the sugar was the same, because the only thing that can be taken into consideration is the market price of the sugar looked at from the point of the quality of the sugar, and therefore the damages which the plaintiffs can recover are merely nominal. The plaintiffs are not entitled to succeed on their claim for money paid under a mistake of fact, because such a claim would have to be supported by a total failure of consideration, and here the plaintiffs actually received the goods and resold them. A seller under a c.i.f. contract, apart from fraud, does not guarantee the accuracy of the documents which he tenders in fulfilment of his contract, and he is under no duty to tender documents which are accurate.

Le Quesne K.C. replied.

Cur. adv. vult.

June 20. WRIGHT J. [after stating the facts read the following judgment:] As I have held that the defendants have broken their contract, I have to consider what are the damages which the plaintiffs ought to recover. The defendants' case is that the plaintiffs cannot recover more than nominal damages. They contended that the plaintiffs, having accepted the sugar in question and disposed of it, cannot reject it, and the only relevant consideration is that the market value of the sugar, considered simply as sugar solely from the standpoint of quality apart from the date of shipment, was in no way affected by the breach of contract. The plaintiffs contended that even if that were a true argument on the limited question of a failure to deliver goods answering to the contract description, there were other relevant and vital considerations which I now consider. A c.i.f. contract, such as those in question, is a contract for the sale and delivery of goods which must be shipped as called for by the contract description, but it is also a sale of documented goods. The c.i.f. seller is bound to procure and tender to the buyer shipping documents, that is, in particular, a bill of lading which will, among other things, show the date of shipment, that being a condition of the contract. In my judgment it is an implied condition of the contract that the bill of lading so to be tendered shall be a true and accurate document and correctly state the date of shipment. Such a condition seems to me to be absolutely necessary to give to the transaction such business efficacy as the parties must have intended. It is on the faith of the bill of lading that the buyer is called upon to pay the price if he has to pay cash against documents, or to make himself liable for the price if he has opened a credit or otherwise agreed to give his acceptance against documents, and it is on the faith of the bill of lading that he accepts the goods, so far as the essential fact of shipment date is concerned. He is, indeed, entitled to a reasonable time to inspect the goods after discharge from the ship, but he has, as a rule, no independent means of checking the accuracy of the bill of lading date, at least in any reasonable time, or before he has so acted as to have accepted the goods. In any case the buyer is, I think, entitled to rely on the accuracy of the bill of lading date, and to regard the seller as impliedly guaranteeing its accuracy, unless there are express terms in the contract to the contrary. If that were not so, the buyer would in most cases be left without any effective remedy in respect of most serious losses sustained by him through misdated bills of lading. There may be no difference in market value (quality being identical) between an October and a September shipment, if the goods only are looked at and their actual quality, and it may be said that the buyer has not suffered damage and is only entitled to nominal damages, as the defendants say here. But I think such a view has little regard to the business realities of the position. The buyer under such a contract as those in question has the right to reject the tender of documents and refuse to pay the cash or accept the draft, if the shipment is not made in the contract month. The effect of misdating the bill of lading is to deprive him of that right by rendering its exercise impossible, if he relies, as in practice he generally must rely, and in law is entitled to rely, on the accuracy of the bill of lading date. He takes delivery of the goods and pays for them, because on the face of the bill of lading he is bound to do so under the contract, whereas if the bill of lading showed because it was a true document that the sellers could not enforce the contract, because the shipment was out of date, the buyer could and would refuse the tender and could obtain the same goods at their market price, which I assume to be lower than the contract price, that is, at a great saving to himself. Mr. Geddes, the plaintiffs' Bombay manager, said in evidence, which evidence I accept, that if the bill of lading had borne an October date he would have stopped payment or acceptance of the draft by cabling to the plaintiffs' London office, and would not have taken up the sugar, because it was not in accordance with the contract. In the same way the manager of the plaintiffs' London office said that before accepting the drafts they would look at the documents to see if they corresponded with the contract. In such a case the difference between the market price and the contract price, the latter being higher than the former, represents, in my judgment, the measure of damages in favour of the buyer for breach by the seller

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(1) (1887) 19 Q. B. D. 333.

(2) (1922) 27 Com. Cas. 142.

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of his obligation to deliver a correct bill of lading. The obligation is in its nature, I think, a condition, and if the breach were known in time the buyer could reject the documents; but from its very nature the breach is often only ascertainable when it is too late to reject the documents or treat the contract as repudiated, and no remedy is possible to the buyer except a claim for damages, as on the footing of a breach of warranty. The measure of damages in such a case, in my judgment, is that which I have explained, and it seems to me exactly to fall within the language of s. 53, sub-s. 2, of the Sale of Goods Act, 1893—namely, "the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty." I apply once more the language of Fry L.J., recently quoted by Lord Dunedin in *Hall* v. *Pim* (1), from *Hammond* v. *Bussey* (2): "What may the Court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of the contract, assuming the parties to have applied their minds to the contingency of there being such a breach?" In the present case it seems to me clear that the parties must have contemplated that the buyers would, by taking up the documents and accepting the goods on the faith that they were bound to do so, pay the higher contract price instead of the lower market price, and lose their right to reject and suffer damage accordingly.

I may add that where the sellers are shippers it is almost inconceivable that such a breach of contract can be other than designed by them, since only the sellers in such a case have any motive to procure from the ship the misdating of the bill of lading, which can scarcely be accidental. I do not deal with the case on the basis of fraud since fraud is not alleged, but I must not be taken to agree with the contention that the defendants must be deemed to have acted in good faith on the basis of an alleged custom or practice, about which I have expressed my opinion. Nor can I attach any weight to the contention that the incorrectness of the date is a technical breach, since the sugar is the same sugar whether shipped on September 30 or October 1. In a business sense it is not the same; the date of shipment is of primary commercial importance; on it, in any case, depends the legal position of the parties, since the date of shipment is a condition of the contract—*Bowes* v. *Shand* (1)—and on that legal position depend serious financial consequences.

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(1) (1928) 30 Ll. L. Rep. 159, 161.

(2) (1887) 20 Q. B. D. 79, 100.

As I have not been referred to any express decision on the point, I have to decide the question on principle. *Taylor & Sons* v. *Bank of Athens* (2) has given me no guidance, because McCardie J. there had merely to decide a limited question put before him in a special case stated by arbitrators, in which the only question was whether the sellers committed a breach of contract in not shipping the goods within the proper period. No question was there raised as to the breach of contract in not tendering correctly dated documents.

The high standard of correctness which is almost universally, as I am convinced, observed all over the world in the dating of bills of lading is a matter of the utmost commercial importance, and I should be sorry to think that it can be departed from with impunity.

The defendants also raise another point as regards the 150 tons which were resold on the contracts above referred to—namely, that the plaintiffs suffered no damage, because by reason of clause 7 in those contracts they were entitled to force the goods on the buyers even after they ascertained that the bill of lading dates were not correct, and hence could have recouped themselves for the money they had paid on the misdated bills of lading. That contention assumes that the sub-buyers were solvent, of which no evidence is forthcoming, but where the proper measure of damages has been prima facie established, it is for "the defendant to show circumstances which would entitle him to a mitigation": *Roper* v. *Johnson*. (3) But there is a wider objection. No doubt a plaintiff is bound to take steps to minimize damages, but that doctrine must be construed reasonably. The principle is thus stated by Lord

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(1) 2 App. Cas. 455.

(2) 27 Com. Cas. 142.

(3) (1873) L. R. 8 C. P. 167, 181.

Haldane L.C. in the *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Rlys. Co. of London* (1): "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co.* v. *Lever* (2), 'The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.'" In the present case I have had the evidence of Mr. Geddes, the manager of the plaintiffs at Bombay, a witness of the highest standing, who says that in no case would his company seek to enforce a misdated bill of lading on their buyers as soon as they knew it was incorrect. I fully accept his statement, and can appreciate not only why they would regard it as a dishonourable act, but also why it should affect their business standing in the East.

In addition I have heard arguments on both sides, though I do not think it necessary to express a final opinion, on the question whether the plaintiffs would succeed in any action against their sub-buyers. In any case the proceedings, even if successful, might be prolonged to the Privy Council through the Indian Courts, and finally fail in securing them fruits, but, on the contrary, leave the plaintiffs saddled with heavy costs. I do not think the defendants are entitled to impose on the plaintiffs this burden, or make it a condition of the recovery of the damages, to which the plaintiffs are, if my judgment is right, prima facie entitled. I do not think they have sufficiently established circumstances which would entitle them to a mitigation of damages.

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(1) [1912] A. C. 673, 689.

(2) (1878) 9 Ch. D. 20, 25. The quotation in the report in [1912] A.C. is not textually accurate.

I think the plaintiffs are entitled to judgment for the difference between the contract price, which they paid to the defendants, and the market value of the actual goods; that is limited to the 250 tons.

I do not deem it necessary to discuss further the two alternative forms in which the plaintiffs claim damages—namely, those set out in the first part of para. 7 and in para. 8 of the points of claim. I leave those claims, which were argued before me, undiscussed, since I decide the case in the manner I have already explained. There will, accordingly, be judgment for an amount to be fixed on the basis that I have indicated, and for costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Sanderson, Lee & Co.*
Solicitors for defendants: *Ballantyne, Clifford & Co.*

R. F. S.

1928
May 24.

HORRELL *v.* LORD ST. JOHN OF BLETSO.

Landlord and Tenant—Agricultural Holding—Agreed Compensation—Sum "recoverable" in County Court—Action in High Court—Jurisdiction of High Court—Agricultural Holdings Act, 1923 (13 & 14 *Geo.* 5, *c.* 9), *s.* 19.

Sect. 19 of the Agricultural Holdings Act, 1923, which provides that, where any sum agreed or awarded under the Act to be paid for compensation by a landlord or tenant of a holding is not duly paid, it shall be recoverable in the county court, does not give exclusive jurisdiction to the county court in all cases and prevent an action from being brought to recover the sum in the High Court when it is in excess of the amount ordinarily recoverable in the county court.

In re Jones and Carter's Arbitration [1922] 2 Ch. 599 applied.

ACTION tried as a short cause by Talbot J.

The plaintiff, E. H. Horrell, was the tenant, and the defendant, Lord St. John of Bletso, was the landlord of a farm called Harings Farm, Melchbourne, in the county of Bedford. On September 29, 1927, by agreement between the parties, an inventory and valuation were made by the respective valuers of the parties of the tenant right upon the farm, by which it appeared that the compensation payable by the defendant to the plaintiff under the Agricultural Holdings Act, 1923, was 532*l*. 3*s*. 6*d*.

On March 14, 1928, the plaintiff brought the present action against the defendant in the High Court, claiming 420*l.* 13*s.* 6*d.*, being the amount of the above mentioned compensation, and 1*l.* for half stamp on the award, less 112*l.* 10*s.*, one half year's rent of the farm due on September 29, 1927.

The defendant in his defence said that the sum claimed in the action was a sum or part of a sum agreed or awarded under the above mentioned Act, and was not recoverable by action or otherwise in the High Court of Justice, and that the present proceedings were not maintainable.

Roland Burrows (*Alan Bell* with him) for the plaintiff. This Court has jurisdiction to entertain the action. The action is brought by the plaintiff, as tenant of the holding, against the defendant, as landlord, to recover the compensation found to be due to him for improvements under the Agricultural Holdings Act, 1923, by the inventory and valuation made by agreement between the parties. Sect. 1 of that Act provides that the tenant of a holding shall have a right to compensation for improvements. Sects. 2, 3 and 4, and the First Schedule, provide for the payment of compensation for various kinds of improvement. Sect. 5 provides that if the tenant claims compensation, whether under the Act or otherwise, in respect of any improvement in the First Schedule and if the parties fail to agree the difference shall be settled by arbitration. Sect. 16 provides (inter alia) that any question or difference arising out of any claim by the tenant for compensation payable under the Act or otherwise in respect of the holding shall be determined by a single arbitrator in accordance with the Act. Sect. 19 (1) provides that where any sum agreed or awarded under the Act to be

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(1) The Agricultural Holdings Act, 1923, provides: " Sect. 19. Where any sum agreed or awarded under this Act to be paid for compensation costs or otherwise by a landlord or tenant of a holding is not paid within fourteen days after the time when the payment becomes due, it shall, subject as in this Act provided, be recoverable upon order made by the county court as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable."

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paid for compensation costs or otherwise by a landlord or tenant of a holding is not paid within fourteen days it shall be "recoverable" in the county court. It is not disputed that under s. 19 this action could have been brought in the county court, but it is submitted that it can also be brought in this Court. It is a well established rule that the High Court has jurisdiction to entertain an action of any kind in the absence of any enactment, providing either in express terms or by necessary implication that it is not to have jurisdiction to do so: *In re Jones and Carter's Arbitration* (1); and *Lowther* v. *Clifford*. (2) The Act of 1923 does not provide either expressly or by necessary implication that an action to recover a sum such as that here claimed, cannot be brought in this Court. Sect. 19 in providing that the sum shall be "recoverable" in the county court only means that it is capable of being sued for in that court: see per Warrington L.J. in *Diment* v. *Roberts*. (3) It does not mean that the sum is capable of being sued for in that court only. Both ss. 5 and 16 contemplate that claims for compensation outside the Act, as well as claims for compensation under the Act, may be settled by arbitration under the Act. Before the passing of the Act claims of the former description could undoubtedly have been sued for in the High Court, and as there is no provision in the Act to the contrary, claims of that kind can still be made in that Court.

Graham Mould for the defendant. This Court has no jurisdiction to entertain the action. Sect. 19 of the Act of 1923 provides that where any sum agreed or awarded under the Act to be paid for compensation or otherwise is not paid "it shall . . . . be recoverable upon order made by the county court." That section on its true construction is imperative and means that the sum referred to can be recovered in the county court only. The section does not merely enable or permit the county court to exercise concurrent jurisdiction with the High Court. Where the

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(1) [1922] 2 Ch. 599.

(2) [1925] W. N. 255; [1926] 1 K. B. 185.

(3) [1925] 1 K. B. 9; 93 L. J. (K. B.) 1038.

Legislature intends that a section of the Act shall be merely enabling or permissive, it uses appropriate language which leaves no doubt as to its intention. Thus, s. 36, sub-s. 1, provides that where any dispute arises as to a matter relating to a distress on the holding it " may " be determined by the county court, and that court " may " make an order for any of certain purposes. The language of that and of other enabling provisions of the Act is in marked contrast to that of s. 19. If the last mentioned section had only intended that the sum mentioned might be sued for in the county court as well as in the High Court it would have used words similar to those which occur in the other enabling sections of the Act. The case of *In re Jones and Carter's Arbitration* (1) is distinguishable from the present case. In that case it was not held that the High Court had jurisdiction to do any of the things which the county court was empowered to do by the Agricultural Holdings Act, 1908—namely, refer a question under the Act to an arbitrator, to remove an arbitrator for misconduct, to direct the arbitrator to state a special case, and to set aside an award which had been improperly procured. The case only decided that where a question had been referred by the county court and an award made, the High Court could take cognizance of error on the face of the award where there had been no misconduct of the arbitrator. The plaintiff should not be entitled to bring the action in the High Court when it can be brought at less cost in the county court.

TALBOT J. This action was brought by the plaintiff against the defendant to recover a sum arrived at by agreement between the parties as the compensation to be paid by the defendant, as landlord, to the plaintiff, as tenant, under the Agricultural Holdings Act, 1923. The only question is whether an action to enforce the agreement can be brought in the High Court or is confined to the exclusive jurisdiction of the county court. The amount claimed in the action is in excess of the amount ordinarily recoverable in the county

(1) [1922] 2 Ch. 599.

court. The Act deals in its earlier sections with the right to compensation and with the various kinds of compensation, and in s. 16 with the way in which an arbitration under the Act is to be conducted. The section upon which the question in the present case turns is s. 19, which is as follows. [His Lordship read the section:] The sum sued for in this action is, within the meaning of that section, a sum agreed or awarded under the Act to be paid for compensation by the landlord of a holding and not paid within fourteen days after the time when it became due, and there is therefore no doubt that under that section the plaintiff could have taken proceedings to recover it in the county court. So much is common ground. The question is whether the right which the section gives to a party to recover any sum under the Act in the county court is exclusive and implies an inability or incapacity to bring an action for it in the High Court. The answer to that question depends upon the construction of the section, and in construing the section the only safe rule to apply is that which directs that one should endeavour to ascertain from the words used what the Legislature has enacted. The language of s. 19 is permissive and not imperative. The section says that where the sum agreed or awarded is not paid it "shall be recoverable" upon an order made by the county court. It does not say that the sum "shall only be recoverable" or that it "must be recovered" upon an order so made. The Legislature might easily have used such words as these if it had desired to do so, but it has not done so. It is clear, both on principle and authority, that if the prima facie right of a person to bring an action in the High Court is to be taken away it must be by express words or by necessary implication from the words used, and here the requisite words do not occur. In coming to this conclusion I am assisted to some extent by the case of *In re Jones and Carter's Arbitration*. (1) That case arose under the now repealed Agricultural Holdings Act, 1908. That Act provided that all questions arising under a contract of tenancy should be referred to an arbitrator;

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(1) [1922] 2 Ch. 599.

that where an arbitrator misconducted himself the county court might remove him; that the arbitrator should if so directed by the county court state a special case for the opinion of that court; that if such a case were stated then the opinion of that court was to be final unless as therein provided; and that when an arbitrator had misconducted himself, or an arbitration or award had been improperly procured, the county court might set the award aside. The point raised was whether the Act by conferring these powers upon the county court excluded the inherent jurisdiction of the High Court to set aside an award under the Act on the ground of error appearing on the face of it where there had been no misconduct on the part of the arbitrator. It was held that it did not, because there was not in the Act any express provision or necessary implication to that effect. That case may indeed be regarded as somewhat stronger than the present case, inasmuch as the Lords Justices came to the conclusion at which they there arrived, notwithstanding that they were of opinion that Parliament had intended by the Act of 1908 to lay down a complete code under which the jurisdiction in regard to arbitrations under the Act should be confined to the county court.

Judgment for plaintiff.

Solicitors for plaintiff: *Kingsford, Dorman & Co., for Simpson & Mason, Higham Ferrers.*

Solicitors for defendant: *Chamberlain & Co.*

J. R.

1928
April 18, 30.

THE LORD MAYOR, ETC., OF THE CITY OF BRISTOL *v.* VIRGIN AND OTHERS.

Local Government—Housing—Dwelling-house—Fitness for Habitation—Repair Work done by Local Authority—Expenses—Charge on Premises—Premises subject to Rentcharge—Fee farm rent—Priority of Charge—Housing Act, 1925 (15 *Geo.* 5, *c.* 14), *s.* 3—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 1, *sub-s.* 2 (*b*); *s.* 146, *sub-s.* 5 (*a*); *s.* 205, *sub-s.* 1 (*xxiii.*).

The charge created by the Housing Act, 1925, s. 3, sub-s. 3, for expenses incurred by a local authority under that section in doing work necessary to make a house reasonably fit for human habitation, is a charge upon the entirety of the interests in the premises, and ranks in priority to a perpetual yearly rentcharge thereon whether created by grant or reservation.

Paddington Borough Council v. *Finucane* [1928] Ch. 567 held applicable.

APPEAL from Bristol County Court.

By an indenture dated September 30, 1905, Joseph Horsey Cordeux, therein called "the grantor," granted to Alfred Charles Virgin, thereinafter called "the grantee," the freehold land and house then in course of erection thereon, 57 Seneca Street, St. George, in the city and county of Bristol, to hold the premises unto the grantee to the use that the grantor should have in fee simple a perpetual rentcharge of 3*l.* issuing out of the land and premises, and subject to the rentcharge and to the statutory powers and remedies for recovering and compelling payment thereof to the use of the grantee in fee simple. The indenture contained a covenant by the grantee to pay the rentcharge, to complete the house, to keep it in repair, to insure it, and to reinstate it if damaged by fire or tempest, and it gave a right of re-entry for non-payment of the rentcharge or other breach of covenant.

A. C. Virgin afterwards mortgaged the premises to Bevan, Hancock & Co.

The premises having become out of repair the corporation served upon A. C. Virgin a notice to repair, dated September 22, 1925, under the Housing Act, 1925, s. 3 (1),

(1) The Housing Act, 1925, provides:

Sect. 3. "(1.) If the owner of any dwelling-house suitable for occupation by persons of the working classes fails to make or keep the house in all respects reasonably fit for human habitation, then, without prejudice to any other powers, the local authority may serve a notice and in default of compliance by him with that notice they did the work themselves at a cost of 60*l.* 10*s.*

The corporation then served upon A. C. Virgin a demand dated July 1, 1926, for payment of the above mentioned sum with interest thereon, but the latter did not comply with the demand.

In October, 1927, the corporation brought the present action in the county court against A. C. Virgin, J. H. Cordeux and Bevan, Hancock & Co., Ld., claiming a declaration that under the Act of 1925, s. 3, the plaintiffs were entitled to a charge on the dwelling-house and premises, the property of the defendant Virgin, for the aforesaid sum with interest thereon, and that that charge ranked in priority to the mortgage of the defendants Bevan, Hancock & Co., and the fee farm rent vested in the defendant Cordeux respectively.

On December 13, 1927, the county court judge gave judgment, ordering that under the above mentioned section the plaintiffs were entitled to a charge on the dwelling-house and premises for the amount claimed, that that charge ranked in priority to the mortgage of the defendants Bevan, Hancock & Co., but not in priority to the fee farm rent vested in the defendant Cordeux.

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upon the owner of the house requiring him within a reasonable time, not being less than twenty-one days, specified in the notice, to execute the works specified in the notice as being necessary to make the house in all respects reasonably fit for human habitation: . . . ."

"(2.) If the notice of the local authority is not complied with, then . . . . the local authority may themselves do the work required to be done."

"(3.) Any expenses incurred by the local authority under this section, together with interest at such rate as the Minister may, with the approval of the Treasury, from time to time by order fix, from the date of service of a demand for the same till payment thereof from the owner, may be recovered in a court of summary jurisdiction and until recovery of such expenses and interest the same shall be a charge on the premises. . . . ."

"(5.) The local authority shall, for the recovery of their expenses with interest, have all the same powers and remedies under the Conveyancing Acts, 1881 to 1922, and otherwise as if they were mortgagees having powers of sale and lease, of accepting surrenders of leases and of appointing a receiver."

"(10.) In this section 'owner' has the same meaning as in the Public Health Acts."

The plaintiffs appealed on the ground that the judge was wrong in law in holding that according to the proper construction of the Act of 1925, the said charge did not rank in priority to the fee farm rent.

The Hon. R. Stafford Cripps K.C. and *R. Gilbert* for the plaintiffs, appellants. The notice served by the plaintiffs upon the defendant Virgin pursuant to the Housing Act, 1925, s. 3 (1), requiring him as owner of the house in question to execute the repairs thereto not having been complied with, and the plaintiffs, having done the work themselves, it follows that under sub-s. 3 of that section the expenses incurred by the plaintiffs under the section until recovered are a charge on the premises.

The Law of Property Act, 1925 (2), provides by s. 1, sub-s. 1, that a term of years absolute is an estate in land, by s. 1, sub-s. 2, that a rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute is an interest in land, by s. 146, sub-s. 5 (*b*), that " lease " includes a fee farm rent, and by s. 205, sub-s. 1 (xxiii.), that " rentcharge " includes a fee farm rent. On the true construction of these provisions a fee farm rent issuing out of premises, such as that reserved to the defendant Cordeux, is an interest in the land out of which it issues. These provisions are declaratory of the law as it previously existed. Thus, in *Creed* v. *Creed* (3) Lord Cottenham observed that a rentcharge or annuity issuing out of the land was an interest in the land itself; and in *Pitt* v. *Lord Dacre* (4) it was stated by Hall V.-C. during the argument that the owner of a rentcharge enforceable by distress and entry had a legal estate. A statutory charge upon premises given to a local authority for expenses incurred by it in doing work in respect of the premises, such as the charge given to the plaintiffs, is a charge not only upon the estate of the owner of the rack rent, but upon the entirety of the interests in the property which have benefited by the work in proportion to the value of these interests:

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(1) See note (1) ante, p. 622.

(2) The material provisions of this Act are mentioned below in the judgment of Salter J.

(3) (1844) 11 Cl. & F. 491, 508.

(4) (1876) 3 Ch. D. 295.

Tottenham Local Board of Health v. *Rowell* (1); *Birmingham Corporation* v. *Baker* (2); and *Paddington Borough Council* v. *Finucane.* (3) Thus, in the last mentioned case it was held that the statutory charge under the section now in question had precedence to the interest of a person entitled to a long term of years in the land. It has never, apparently, been expressly decided that a statutory charge such as this is a charge upon a fee farm rent issuing out of the land and has priority over it, but the cases last cited tend to show that it would have priority over an interest of that kind. The case of *Tendring Union Guardians* v. *Dowton* (4), on which reliance was placed by the county court judge, is distinguishable from the present case, because in that case the interest which was held not to be affected by the statutory charge was not an interest in the premises to which the charge applied, but the interest of a person entitled to other property who merely had the benefit of a covenant restricting the use of the premises. It is submitted that it follows from these conditions that the charge to which the plaintiffs are entitled under the Housing Act, 1925, s. 3, ranks in priority to the fee farm rent reserved to the defendant Cordeux.

The respondents did not appear by counsel or at all.

1928. April 30. SALTER J. read the following judgment:—

The plaintiffs sued in the Bristol County Court claiming (inter alia) a declaration that they are entitled under s. 3 of the Housing Act, 1925, to a charge on certain premises the property of the defendant Virgin, and that such charge ranks in priority to the mortgage of the defendants Bevan, Hancock & Co., and to the fee farm rent vested in the defendant Joseph Horsey Cordeux. The learned judge held that the plaintiffs were entitled to the charge and that it ranked in priority to the mortgage, but not to the fee farm rent. The plaintiffs appeal. [His Lordship stated the facts, read the relevant provisions of the indenture of September 30, 1925, and continued as follows:] The plaintiffs are admittedly entitled to a charge on the premises, and the question is whether such charge ranks in priority to the rentcharge of the defendant Cordeux.

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(1) (1880) 15 Ch. D. 378, 390.

(2) (1881) 17 Ch. D. 782.

(3) [1928] Ch. 567.

(4) [1891] 3 Ch. 265.

By the Law of Property Act, 1925, s. 1, sub-s. 2 (*b*), a perpetual rentcharge in possession issuing out of land is a legal interest in or charge over land. By s. 205, sub-s. 1 (xxiii.), "rentcharge" includes a fee farm rent. By s. 121 remedies are given for the recovery of annual sums charged on land if such remedies might have been conferred by the instrument creating the charge, and such remedies include a right to distrain and a right to enter and receive the rents. By s. 146, sub-s. 5 (*a*), "lease" includes a grant at a fee farm rent.

Sect. 3 of the Housing Act, 1925, provides that the expenses incurred by the local authority may be recovered from the owner, "and until recovery of such expenses and interest the same shall be a charge on the premises." In the absence of authority it might be suggested that Parliament did not intend that this charge should override existing charges, but that it should be such a charge as the defaulting owner could give. The decided cases make it clear that the words are not to be so restricted, and if it is admitted that the charge may give rights that the owner could not confer I see no ground on which it can be held that the plaintiffs' charge does not rank in priority to this rentcharge. There is only one reported decision on these words in this section, but there are decided cases on similar words in earlier statutes. In *Tottenham Local Board of Health* v. *Rowell* (1) expenses had been incurred by the plaintiffs for street works, and the charge was created by s. 62 of the Local Government Act, 1858, which provides that "such expenses shall be a charge on the premises in respect of which they were incurred." James L.J. said: "There is a distinct statutory charge in respect of those expenses, and it is not an unreasonable thing, because the property is improved. The works were done for the benefit of the property, fitting the property for building, and the like, and therefore it is not at all

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(1) 15 Ch. D. 378.

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BRISTOL CORPORATION v. VIRGIN.

Salter J.

unreasonable or surprising to find it declared in an Act of Parliament in default of other remedies, that the property which is improved, and which has had the benefit, must bear the onus. There are the words 'that such expenses shall be a charge on the premises in respect of which they were incurred,' and the premises no doubt mean the property which has been improved, and not any particular interest in the property." (1) In *Birmingham Corporation* v. *Baker* (2) the charge was to secure repayment of sewering and paving expenses and was created by s. 257 of the Public Health Act, 1875. The defendant, a mortgagee, contended that the charge was only on the interest of the owner as defined by the statute and that her mortgage had priority. The words of the section are, "and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred." Jessel M.R. said: "The works in question are an improvement to the property, not to the interest of any particular owner of the property, but of every owner of the house; and consequently there is no good reason in the world why there should not be a charge on the property, that is, on the respective interest of every owner of the property according to the value of his ownership." (3) After citing *Tottenham Local Board of Health* v. *Rowell* (4), he said: "I agree, it is most rational that the property which has been improved should bear the burden, and that all the houses in the street shall bear their burden in proportion. Now, the houses per se being inanimate, they cannot bear the burden. If there be a charge on the houses it is a charge on the total ownership—if I may call it so, on the proprietorship: not on any particular section or portion of the proprietorship, but on the whole." (3) In *Tendring Union Guardians* v. *Dowton* (5) the charge created by s. 257 of the Public Health Act, 1875, was held by the Court of Appeal not to override a covenant restricting the use of the land charged for the benefit of an adjoining owner. Lord

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(1) 15 Ch. D. 390.

(2) 17 Ch. D. 782.

(3) 17 Ch. D. 782, 785.

(4) 15 Ch. D. 378.

(5) [1891] 3 Ch. 265.

Halsbury L.C. cited with approval the judgment of the Master of the Rolls in *Birmingham Corporation* v. *Baker*. (1) Fry L.J. said: "I think there is nothing to justify a declaration that the charge overrides the restrictive covenant. All the Act does is to create a charge on the premises—that is on the land—that is, on all the interests of the owners of the land."

The only reported decision on the present section is a judgment of Russell J. in *Paddington Borough Council* v. *Finucane*. (2) The learned judge said that the first point to determine was what was the effect of s. 3 of the Housing Act, 1925, as regarded the charge which it purported to give. Was it a charge upon all the proprietary interests in the property? On the authorities that had been cited there was no difficulty in saying that the section, when it conveyed a charge on the property, meant not a charge on the interest of the owner of the rack rent in the premises, but a charge upon the entirety of the interests of the premises, the whole proprietary interests of the premises.

The interests in land which have been postponed to the statutory charge in the above cases have been interests created by grant. The interest of the defendant Cordeux is created by reservation. The learned county court judge, if I apprehend his judgment rightly, relied on this distinction, but it seems to me immaterial. The language used in the cases cited above is studiously wide and general. I think that the interest of the defendant Cordeux under his rentcharge is part of the total ownership or total proprietorship. I think it is part of the interests of the owners of the land and part of the entirety of the interests of the premises and of the whole of the proprietary interests.

On the words of the statute and the authorities above cited I think that the plaintiffs' charge must rank in priority to the rentcharge of the defendant Cordeux. The appeal must be allowed and the declaration amended accordingly.

TALBOT J. I am of the same opinion. I had prepared a judgment in this case, but it follows so closely the judgment

(1) 17 Ch. D. 782.

(2) [1928] Ch. 567.

which has just been delivered that no useful purpose would be served by reading it.

I would only add that the two cases quoted to us in argument, *Creed* v. *Creed* (1) (the judgment of Lord Cottenham) and *Pitt* v. *Lord Dacre* (2), show that apart from the special statutory enactments which have been referred to, such a rentcharge as this is an interest in the land itself and a part of the property. It may also be worth while to add, there is really no distinction other than technical between the position of an owner in fee subject to a term of 2000 years, as in the case of *Paddington Borough Council* v. *Finucane* (3), and that of the owner of the rentcharge in the present case.

Appeal allowed.

Solicitors for appellants: *Robins, Hay, Waters & Hay, for Town Clerk, Bristol.*

J. R.

HART *v.* HUDSON BROTHERS, LIMITED.

1928
July 20.

Weights and Measures—False Scale—Charge of Offence under earlier Act—Notice of Defence under later Act—Provision that Acts be construed together—Validity of Defence—Weights and Measures Act, 1878 (41 *&* 42 *Vict. c.* 49), *s.* 25*—Sale of Food (Weights and Measures) Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 63), *s.* 12, *sub-s.* 5; *s.* 15, *sub-s.* 1.

An employer charged with unlawfully having in his possession for use for trade a scale which is false or unjust contrary to s. 25 of the Weights and Measures Act, 1878, may rely by way of defence upon s. 12, sub-s. 5, of the Sale of Food (Weights and Measures) Act, 1926, which provides that where an employer charged with an offence against "this Act" proves that he used due diligence to enforce the Act and that another person committed the offence without his consent, connivance or wilful default, the employer shall be exempt from any penalty; inasmuch as s. 15, sub-s. 1, of the latter Act provides that that Act shall be construed as one with the Act of 1878, and there is no manifest discrepancy between the above mentioned provisions of the two Acts.

Canada Southern Ry. Co. v. *International Bridge Co.* (1883) 8 App. Cas. 723 and *Willingale* v. *Norris* [1909] 1 K. B. 57 principle applied.

CASE stated by justices for the county of Surrey.

The appellant, G. F. Hart, by order and on behalf of the Surrey County Council, laid an information against the

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(1) 11 Cl. & F. 491, 508.
(2) 3 Ch. D. 295, 299.
(3) [1928] Ch. 567.

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respondents, Messrs. Hudson Brothers, Ld., charging that they on February 3, 1928, at the parish of Sutton, in that county, did unlawfully have in their possession for use for trade a scale which was false or unjust contrary to the Weights and Measures Act, 1878, s. 25. (1)

On March 15, 1928, the information was heard by the justices, when the following facts were proved or admitted: On February 3, 1928, an inspector of weights and measures employed by the county council visited the premises of the respondents, who carried on business as grocers and provision dealers at 40 High Street, Sutton, where he examined a scale, namely, a 20lb. price-computing, weighing instrument, which the respondents had in their possession for use for trade. The inspector examined and tested the scale, and found, upon every occasion of testing, that the scale indicated ½oz. in excess of the load placed upon it, or, in other words, that the scale was ½oz. deficient in weight. The respondents' manager in the shop agreed that that was so, and, on being requested by the inspector, adjusted the scale with a balancing key. The inspector thereupon retested the scale and found it correct.

(1) The Weights and Measures Act, 1878, provides:—Sect. 25: "Every person who uses or has in his possession for use for trade any weight measure scale balance steelyard or weighing machine which is false or unjust, shall be liable to a fine not exceeding five pounds, or in the case of a second offence ten pounds, and any contract bargain sale or dealing made by the same shall be void, and the weight measure scale balance or steelyard shall be liable to be forfeited."

The Sale of Food (Weights and Measures) Act, 1926, provides:—Sect. 12: "(5.) Where an employer or principal is charged with an offence against this Act, he shall be entitled on information duly laid by him, and on giving not less than three days' notice of his intention to the prosecution, to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge, and, if after the commission of the offence has been proved, the employer or principal proves to the satisfaction of the court that he had used due diligence to enforce the execution of this Act, and that the said other person had committed the offence in question without his consent, connivance or wilful default, the said other person shall be summarily convicted of the offence and the employer or principal shall be exempt from any penalty."

Sect. 15: "(1.) This Act . . . . shall be construed as one with the Weights and Measures Acts, 1878 to 1926, and shall be included amongst the Acts which may be cited as the Weights and Measures Acts, 1878 to 1926."

The respondents gave notice to the appellant under the Sale of Food (Weights and Measures) Act, 1926, s. 12, sub-s. 5 (1), that they intended to bring before the court at the time appointed for hearing the charge their servant, the manager of the branch shop where the offence had been committed, as the person whom they charged as the actual offender.

At the hearing, after the commission of the offence had been proved to the satisfaction of the justices, the respondents proved to their satisfaction that they had used diligence to enforce the execution of the Act of 1878, and that the manager had committed the offence without their consent, connivance, or wilful default.

It was contended for the appellant that the procedure under s. 12, sub-s. 5, of the Act of 1926 was not applicable to proceedings in respect of offences charged under the Act of 1878 but only to proceedings under the Act of 1926.

It was contended for the respondents that as by s. 15, sub-s. 1, of the Act of 1926 (1) that Act is to be construed as one with the Weights and Measures Acts, 1878 to 1926, the provisions of s. 12, sub-s. 5, of the Act of 1926 (1) must be read into each and all of the earlier Acts, and that the safeguards therein provided are applicable to proceedings in respect of offences under all the Weights and Measures Acts.

The justices found that the respondents had committed the offence charged, and were of opinion that the provisions of s. 12, sub-s. 5, of the Act of 1926 were applicable to the proceedings, and they therefore dismissed the information against the respondents. They also dismissed the case against the respondents' manager upon payment of costs.

The question for the Court was whether the justices were right in dismissing the information against the respondents.

H. D. Roome for the appellant. The justices were wrong in dismissing the information. The charge against the respondents was that, contrary to s. 25 of the Weights and Measures Act, 1878 (1), they had in their possession for use for trade a scale which was false or unjust, and they were not entitled by way of defence to a charge under that Act

(1) See note (1) ante, p. 630.

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to avail themselves of s. 12, sub-s. 5, of the Sale of Food (Weights and Measures) Act, 1926 (1), which enables an employer charged with an offence against the latter Act to escape conviction by proving that the offence was committed by his servant. The purposes of the two Acts are entirely distinct. The Act of 1878 is concerned with the provision of standard weights and measures and weighing and measuring instruments, and not with articles of food. The Act of 1926 is concerned with the prohibition of persons selling articles of food from giving short weight or measure. It is true that s. 15, sub-s. 1, of the Act of 1926 provides that that Act shall be construed as one with the Act of 1878. That provision means that the Acts are to be construed together so far as necessary for giving effect to any specific direction in the later Act that some provision of the one Act is to apply to the other. Thus, for example, as s. 10 of the Act of 1926 makes the inspection and sale thereunder of pre-packed articles of food subject to the powers of inspectors under the Act of 1878, that section must be construed with the earlier Act. It does not follow, however, that the Acts are to be read together for the purpose of incorporating into the earlier Act provisions of the later Act which are inapplicable to it. It cannot be intended, for example, that s. 14 of the later Act which provides that that Act shall apply only to retail dealings, shall be incorporated in the earlier Act. Neither can it be intended that s. 12 of the Act of 1926 should be read into the earlier Act. That section forms a complete code of defences to proceedings under the Act of 1926 for a deficiency in the weight or measure of an article of food sold. Each of the sub-sections of that section relates expressly to proceedings under the Act of 1926, and, except in so far as sub-ss. 1 and 4 refer to pre-packed articles of food, all these sub-sections are inapplicable to the Act of 1878. To take sub-s. 5 or indeed any of these sub-sections away from its context and read it into the Act of 1878 would do violence to the scheme of the section and would extend the Act of 1878 in a manner not contemplated by the Legislature. Sect. 12 of the Act

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(1) See note (1) ante, p. 630.

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of 1926 is intended to apply to cases in which an article of food is sold which is deficient in weight or measure owing to unavoidable circumstances or to the accidental mistake of an assistant, but it is not intended to apply to offences of so serious a nature as those contemplated by the Act of 1878. The case of *Canada Southern Ry. Co.* v. *International Bridge Co.* (1) is distinguishable from the present case. In that case it was held that where two Acts were to be read together a section of the later Act could be read into the earlier Act, as there was no manifest discrepancy between that section and the earlier Act. In the present case there is such a discrepancy between s. 12, sub-s. 5, of the Act of 1926 and the Act of 1878 as renders that sub-section inapplicable to the earlier Act. The case of *Willingale* v. *Norris* (2) is also distinguishable. In that case, unless the penal section of the later Act had been read into the earlier Act, there would have been no adequate penalty for a breach of the regulations under the earlier Act; but in the present case there is no reason for reading s. 12, sub-s. 5, of the Act of 1926 into the Act of 1878.

R. M. Montgomery K.C. and *Walter Frampton*, for the respondents, were not called upon to argue.

LORD HEWART C.J. This is a case stated by justices for the county of Surrey. The appellant, on behalf of the Surrey County Council, charged the respondents with unlawfully having in their possession for use for trade a scale which was false or unjust contrary to the Weights and Measures Act, 1878, s. 25. (3) The respondents, by way of answer to the charge, gave notice to the appellant under the Sale of Food (Weights and Measures) Act, 1926, s. 12, sub-s. 5 (3), that they intended to bring before the Court their servant, the manager of the branch shop where the offence was alleged to have been committed, as the person whom they charged as the actual offender. The procedure under that sub-section being followed, the justices were satisfied that the respondents had used due diligence to enforce the execution of the Act,

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(1) 8 App. Cas. 723.

(2) [1909] 1 K. B. 57.

(3) See note (1) ante, p. 630.

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and that the manager had committed the offence without their consent, connivance or wilful default. It may be observed that on the facts found in the case the scale was unsatisfactory, not as being wrongly constructed or inherently defective, but only because at the particular time when it was inspected it was not suitably adjusted—a defect immediately remedied by means of a balancing key in the presence of the inspector himself. The justices applied s. 12, sub-s. 5, of the Act of 1926, to a charge under s. 25 of the Act of 1878, and dismissed the charge.

The question is whether the justices were right in law in taking this course. The argument on behalf of the appellant is that the procedure under s. 12, sub-s. 5, of the later Act is not applicable to proceedings under the earlier Act, but only to proceedings under the later Act. Counsel for the appellant, however, with his usual candour, has directed the attention of the Court to the two cases which are most strongly against his contention. One of these cases is *Canada Southern Ry. Co.* v. *International Bridge Co.* (1) In that case Lord Selborne L.C., referring to two Acts which were there in question, said: "It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act." (2) Applying that canon, I cannot think that there is any manifest discrepancy in giving in relation to the offence here charged the kind of possible defence to an employer which is to be found in s. 12, sub-s. 5, of the later Act. Similarly, in the other case referred to, *Willingale* v. *Norris* (3), it was held that provisions in two separate Acts were to be construed as if they were contained in the same Act. Walton J. there said (4): "It seems clear that the Act of 1850 must be read as one—construed as one—

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(1) 8 App. Cas. 723.
(2) Ibid. 727.
(3) [1909] 1 K. B. 57.
(4) Ibid. 66, 67.

with the Act of 1853 . . . . and I have come to the conclusion that, if the facts should be proved hereafter, there was a breach of the provisions of s. 4 of the Act of 1850. That section gives power to make regulations, and I think there is involved in this that regulations so made must be obeyed, and if so it follows that a breach of such regulations is a breach of the law contained in that section. Sect. 4 of the Act of 1850 is made a provision of the Act of 1853, and therefore I think that the alleged offence was one 'against the provisions of this Act' within the meaning of s. 19 of the Act of 1853." And in like manner Bigham J. said: "How are the words 'against the provisions of this Act' to be read? The two statutes are to be construed as one. In my opinion, to break the regulations made under the authority of a statute is to break the statute itself, and therefore s. 19 of the London Hackney Carriage Act, 1853, must be read thus: 'For every offence against the regulations promulgated under these two Acts, which are to be read as one, a penalty not exceeding forty shillings may be imposed.'" To return to the present case, in the Act of 1926 it is expressly provided by s. 15, sub-s. 1, that: "This Act . . . . shall be construed as one with the Weights and Measures Acts, 1878 and 1926." Construing the Acts in that way, I do not find it possible to say that the decision of the justices was wrong in law. What might perhaps be said is that these words of Walton J. in *Willingale* v. *Norris* (1) are no less applicable here than they were there: "This case is a striking example of the difficulties and obscurity which arise from legislation by reference to and incorporation of other statutes."

I have come to the conclusion that this appeal should fail.

ACTON J. I agree.

BRANSON J. I agree.

Appeal dismissed.

Solicitors for appellant: *Wyatt & Co., for Dudley Aukland, Kingston.*

Solicitors for respondents: *Smith & Hudson.*

J. R.

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(1) [1909] 1 K. B. 57.

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July 12.

MORELLI *v.* FITCH AND GIBBONS.

Sale of Goods—Sale by Description—"Bottle of Stone's Ginger Wine"—Defective Bottle—Implied Condition of Merchantable Quality—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14, *sub-s.* 2.

The plaintiff asked for a bottle of Stone's ginger wine at the licensed premises of the defendants. While the plaintiff was endeavouring to draw the cork with a corkscrew the bottle broke at the neck and injured him:—

Held, that the sale was one by description, and that the bottle was not of merchantable quality, and, consequently, that the condition that it was of such quality implied under s. 14, sub-s. 2, of the Sale of Goods Act, 1893, had been broken, and that the plaintiff was entitled to damages.

Doubt of Vaughan Williams L.J. expressed in *Wren* v. *Holt* [1903] 1 K. B. 610, 615, whether the sub-section applies to the sale of goods over the counter, disapproved.

Appeal from Edmonton County Court.

The plaintiff, Charles Morelli, sued the defendants, Fitch & Gibbons, the licensees of The Cross Keys public-house, Edmonton Green, for damages for personal injuries. On January 21, 1928, he went to the public-house and asked the manager's wife for a bottle of ginger wine. The manager's wife said: "Two and six?" The plaintiff replied, "No. I want Stone's at two and nine." The manager's wife then took a bottle of Stone's ginger wine from the shelf and handed it to the plaintiff, who paid for it and took it home. When there, in order to open it, he used a straight-handled corkscrew, and, holding the bottle with his left hand, began to pull, whereupon the neck of the bottle came away from the bottle, which fell to the ground, and the plaintiff's left hand was cut.

The county court judge found "(1.) I believed and accepted the evidence given by the plaintiff. I find that his evidence is accurate in all material respects. (2.) I find that the corkscrew used was proper and suitable for the purpose of extracting the cork. (3.) I find that the plaintiff attempted to extract the cork in a reasonable and proper manner and with due care. (4.) I find that there was some defect in the bottle

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which rendered it unfit for the purpose for which it was required by reason of its being in such a condition that, when the cork was being extracted in a proper and reasonable manner, it broke, and that by reason of such defect it was not of merchantable quality. (6.) I find that the bottle of ginger wine was bought by description from the defendants and that they dealt in goods of that description." The county court judge accordingly held that the ginger wine was sold with the condition that the bottle was of merchantable quality implied under s. 14, sub-s. 2, of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which enacts: "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—. . . . (2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." He gave judgment for the plaintiff for 21*l.* damages.

The defendants appealed.

Sir R. Mitchell Banks K.C. and *Rhymer* for the defendants. The county court judge was wrong in holding that this was a sale by description. The case of *Wren* v. *Holt* (1) is in point, and it must be admitted that it is against the contention for the appellants. But there is a passage in the judgment of Vaughan Williams L.J. which shows that he entertained doubt on the subject, and only decided as he did on the particular findings of the jury in that case. He said (2): "Speaking candidly, I do not think, taking the generally accepted view of lawyers as to the meaning to be attached to the words 'by description' as applied to a sale, that a sale of goods over a counter,"—which the sale in the present case was—" where the seller deals in the description of goods

(1) [1903] 1 K. B. 610.

(2) [1903] 1 K. B. 615.

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sold, is a sale of goods by description within this sub-section. But in this case we have to consider the findings of the jury."

Secondly, there was no evidence upon which the county court judge could find that this bottle was not of merchantable quality. The defect owing to which it broke was not one which an ordinary and reasonable examination would have disclosed; therefore the plaintiff could have resold it had he so desired, and, as Lord Ellenborough said in *Gardiner* v. *Gray* (1): "the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them." "Merchantable" must be considered with some reference to the circumstances, and it is difficult to suppose that the Legislature meant the sub-section to apply to a case like the present.

[*Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors* (2); *Chaproniere* v. *Mason* (3); and *Varley* v. *Whipp* (4) were also referred to.]

Soskice for the plaintiff. The goods were sold by description. A sale by a trade or patent name is still a sale by description: per Farwell L.J. in *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors.* (2) In *Wren* v. *Holt* (5) Mathew L.J. made it quite clear that he did not share Vaughan Williams L.J.'s doubt.

"Merchantable" refers to the actual condition of the goods. Here the bottle was used in a reasonable manner and it broke, and was therefore not merchantable.

[He was stopped.]

[*Emmerton* v. *Mathews* (6) was also referred to.]

ACTON J. This is an appeal from a decision of His Honour Judge Crawford in a case tried before him in which the plaintiff, Mr. Charles Morelli, claimed from Messrs. Fitch & Gibbons, the defendants, damages for personal injuries arising out of a breach of the defendants' alleged implied warranty of fitness in regard to a bottle supplied under a contract of sale.

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(1) (1815) 4 Camp. 144, 145.
(2) [1910] 2 K. B. 831, 840.
(3) (1905) 21 T. L. R. 633.
(4) [1900] 1 Q. B. 513, 516.
(5) [1903] 1 K. B. 610, 616.
(6) (1862) 7 H. & N. 586.

The facts are very short and very simple, but they give rise to a question of some importance to those who deal in wares of the kind with which this case is concerned. The plaintiff, desiring to purchase a certain kind of cordial wine, went to the shop of the defendants, who are retail dealers in wines and spirits which they sell in bottles. The plaintiff had previously dealt with them on several occasions in the ordinary course of their business. On January 21, 1928, he went into the shop and was served by the wife of the manager, a Mrs. Martin. He asked her for a bottle of ginger wine, and upon her saying interrogatively "Two and six ?" he said: "No. I want Stone's at two and nine." She then got a bottle of this particular kind of ginger wine from the shelf, wrapped it up in paper, and handed it to the plaintiff, who paid the sum of 2*s*. 9*d*. for it, took it away with him, and went home. What took place next was that the plaintiff, desiring to consume the contents of this bottle of ginger wine, applied a corkscrew to the cork and, holding the bottle in his left hand, pulled the corkscrew with his right hand. The result was that the neck of the bottle came away altogether from the bottle; the bottle fell to the ground, and the hand, that is to say, the left hand, with which the plaintiff had been holding it, was somewhat severely cut, and it was in respect of the cuts upon that hand and the consequences thereof that this action for damages was brought as on a breach of warranty arising out of the contract of sale between him and the defendants. In the result the learned judge arrived at certain findings of fact which he has set out with great care in his note of the trial. These findings were as follows: "(1.) I believed and accepted the evidence given by the plaintiff. I find that his evidence is accurate in all material respects. (2.) I find that the corkscrew used was proper and suitable for the purpose of extracting the cork. (3.) I find that the plaintiff attempted to extract the cork in a reasonable and proper manner and with due care. (4.) I find that the bottle broke when the cork was so being extracted. (5.) I find that there was some defect in the bottle which rendered it unfit for the purpose for which it was required by reason of its being in such a condition

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that, when the cork was being extracted in a proper and reasonable manner, it broke, and that by reason of such defect it was not of merchantable quality. (6.) I find that the bottle of ginger wine was bought by description from the defendants and that they dealt in goods of that description." It is upon these facts, and the findings at which the learned judge arrived upon the facts that this appeal is brought by the defendants, who contend that the learned judge was wrong in law in the conclusions at which he arrived.

Under finding No. 5 there is one point to which perhaps it is expedient to refer in passing in order that it may be laid aside. The finding under that head, that there was some defect in the bottle which rendered it unfit for the purpose for which it was required, seems by implication to have some reference to s. 14, sub-s. 1, of the Sale of Goods Act, 1893, but it is, as I understand, common ground between counsel upon either side that the question which the learned judge was asked to determine and did determine was a question outside and independent of that sub-section, and was a question arising under sub-s. 2 of s. 14, the familiar words of which are as follows: "Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed." It is perhaps strictly unnecessary but desirable for the sake of clarity to point out that if the present action was founded upon the assumption that there was in this case such an implied condition as is dealt with in sub-s. 2, and a breach of that implied condition, the plaintiff treated, as he was entitled to do, the breach of that condition as a breach of warranty and sought damages accordingly for a breach of warranty.

The question then arises whether, as Sir Reginald Mitchell Banks for the defendants has argued, the learned judge was wrong in the conclusion at which he arrived. The argument really began with the contention that he was wrong in law in finding (No. 6) that the bottle of ginger wine was bought by description. Now that which was bought was a bottle of Stone's ginger wine, which appears to be a well known brand of that kind of cordial, at the price of 2*s*. 9*d*., which appears to be the well known and recognized price for a bottle of that particular commodity. Having regard to the decision in the case of *Wren* v. *Holt* (1) and the later case of the *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors* (2), it seems to me clear that there was here, as the learned judge has decided, a sale by the defendants to the plaintiff of a bottle of ginger wine at the price of 2*s*. 9*d*. by description, and there is no question in the present case that the defendants deal in goods of that description. In this context perhaps special reference should be made to the passage to which our attention has been drawn in the case of the *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors* in the judgment of Farwell L.J. (3) The learned Lord Justice says: "The implied condition that the goods are of merchantable quality applies to all goods bought from a seller who deals in goods of that description, whether they are sold under a patent or trade name or otherwise ; the only proviso in sub-s. 2, namely, examination by the buyer, is negatived by Lawrance J.'s finding of fact in this case. The phrase 'merchantable quality' seems more appropriate to a retail purchaser buying from a wholesale firm than to private buyers, and to natural products, such as grain, wool, or flour, than to a complicated machine, but it is clear that it extends to both: the definition of 'goods' in s. 62 makes that word include 'all chattels personal other than things in action and money,' and 'quality of goods' includes their state or condition." It seems to me clear that, having regard to these decisions and especially to the passage which I have quoted from Farwell L.J., it is impossible to say that the learned judge was otherwise than perfectly right in coming to the conclusion that there was here a sale of goods, namely, this bottle of Stone's ginger wine, by description by the defendants to the plaintiff. Therefore, in my opinion, the bottle of Stone's ginger wine was a chattel which was bought by description from a seller who dealt in goods of that description, although he was not the manufacturer thereof, and therefore, according to the provisions of s. 14, sub-s. 2, of the Sale of Goods Act, 1893, there was an implied condition that the goods should be of merchantable quality.

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(1) [1903] 1 K. B. 610.

(2) [1910] 2 K. B. 831.

(3) [1910] 2 K. B. 840.

That being so, upon the findings of fact of the learned judge, which are, indeed, not assailed for the purpose of the present appeal, it seems to me impossible to say that he was wrong in arriving at the conclusion that there was a breach of that implied condition. That there was some defect in the bottle which rendered it unfit for the purpose for which it was required is, as I have pointed out, a matter which we can pass over, but the defect was one which also rendered it not of merchantable quality. With regard to the proviso to the sub-section, it equally appears from the findings of the learned judge that the defect was one which no such examination as was available to the plaintiff would or could reasonably have revealed to him.

In these circumstances my decision is that the learned judge was right throughout in the conclusions of law at which he arrived upon the facts as he found them, and that there was no reason whatever why it was not open to him to find the facts as he did. Although it is outside our province to inquire into the facts, provided that there is evidence to support those facts, I think it may fairly be said that any tribunal of fact would almost certainly have arrived at the same conclusion. This appeal fails and ought to be dismissed.

BRANSON J. I agree. It was contended on behalf of the defendants that the learned judge was wrong in law in holding that the purchase in this case was a purchase by description within s. 14, sub-s. 2, of the Sale of Goods Act, 1893. In support of that contention reference was made to a passage in the judgment of Vaughan Williams L.J. in *Wren* v. *Holt* (1), in which he says: "I do not think, taking the

(1) [1903] 1 K. B. 610, 615.

generally accepted view of lawyers as to the meaning to be attached to the words 'by description' as applied to a sale, that a sale of goods over a counter, where the seller deals in the description of goods sold, is a sale of goods by description within this sub-section." I confess that the meaning of the learned Lord Justice is not very clear to my mind, and were it not for the fact that in that case the sale, which the Court held was in substance a sale over the counter of Holden's beer, was held to be a sale by description, I think one might have to consider further the question of the meaning of that passage. But in view of the decision of the Court of Appeal in that case (1) that a sale of beer in a beerhouse, which upon the findings of the jury the Court held to be in substance a sale of Holden's beer, was a sale by description and brought the case within s. 14, sub-s. 2, it seems to me to be clear beyond argument that the sale in this case of Stone's ginger wine across the counter was equally a sale which the learned county court judge, acting as the tribunal of fact in this case, as the jury acted in the other, was entitled to find to be a sale by description so as to bring the case within the sub-section. The same thing follows from a consideration of the case of the *Bristol Tramways, etc., Carriage Co.* v. *Fiat Motors.* (2) I do not propose to refer to that again, as my Lord has read the most relevant passage in the case in the course of his judgment.

The next point taken was that there was no evidence upon which the learned county court judge could come to the conclusion that this bottle was not of merchantable quality, for it was contended that the defect in it, which caused it to break, was not a defect which an ordinary reasonable examination would have disclosed, and, therefore, inasmuch as the plaintiff, if he had been minded to resell, could have done so, it could not be said that the bottle was not of merchantable quality. In my view that contention is entirely unsound. I think that the question whether the article is of merchantable quality or not depends upon the true state of the article and not upon whether its state can be discovered

(1) [1903] 1 K. B. 610.

(2) [1910] 2 K. B. 831.

by a reasonable examination of it. That seems to me to follow quite clearly from the proviso to s. 14, sub-s. 2, of the Sale of Goods Act, 1893, which makes it clear that, even if the buyer has examined the goods, the implied condition makes the seller liable for a latent defect in those goods. This ground also to my mind fails, and the result is that I agree that the learned county court judge has come to a correct conclusion on the law of this case. I agree, if it is open to one to express an opinion on a question of fact found by the learned judge, that upon the evidence I should probably have come to the same conclusion myself. In the result I think this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Avery, Son & Fairbairn.*
Solicitors for respondent: *Palmer & Robinson.*

W. L. L. B.

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July 17.

THE KING *v.* INVESTORS' REVIEW, LIMITED.

Ex parte WHEELER.

Practice—Action—Subpœna duces tecum—Application by Rule Nisi to set aside—Applicant not Party to Action—Rules of the Supreme Court, Order LII., *r.* 2.

By Order LII., r. 2, of the Rules of the Supreme Court: "No motion or application for a rule nisi or order to show cause shall hereafter be made in any action":—

Held, that an application by a person who had been served by one of the parties to an action with a subpœna duces tecum to set the subpœna aside was an application "in" the action, although the applicant was not a party to the action, and that, consequently, the rule could not be heard.

RULE NISI to set aside a subpœna duces tecum as being oppressive and an abuse of the process of the Court.

An action for libel had been commenced by Rolls Razor (1927), Ld., against the Investors' Review, Ld., and the

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Ex parte.

applicant, Sir Arthur Wheeler, who had been one of the promoters of the plaintiff company, had been served on behalf of the defendants with a subpœna duces tecum. The applicant had thereupon obtained this rule.

Clement Davies K.C., *Sir Willes Chitty K.C.* and *Cartwright Sharp* showed cause. There is a preliminary objection to this rule being heard. By Order LII., r. 2: "No motion or application for a rule nisi or order to show cause shall hereafter be made in any action. . . . ." This application is "in" the action.

Jowitt K.C. and *St. John Field* in support. The objection is founded on a misapprehension of Order LII., r. 2. This is not an application "in" the action within the meaning of the rule, because the applicant is not a party to the action, and a stranger to it cannot make an application "in" an action. The words "by any party to the action" are implied in Order LII., r. 2, after the words "in any action."

[*Squire* v. *Hammond* (1); *Rex* v. *Editor of the Daily Mail. Ex parte Factor* (2); and *Rex* v. *Editor of the Wealdstone News* (3) were referred to.]

Clement Davies K.C. in reply. In *Jacques* v. *Harrison* (4) an application under the general words of Order XXVII., r. 15: "Any judgment by default. . . . may be set aside," was allowed to be made by equitable mortgagees to set aside a judgment by default, although they were not parties to the action.

Sir Willes Chitty K.C. (who followed at the request of the Court). This subpœna issued from the Central Office and not from the Crown Office, and this motion should have been in the Civil Paper and not the Crown Paper. But, even assuming that a motion was the correct procedure, it should have been by motion on notice. It is difficult to see why the present application is not made "in" the action. It arises out of a subpœna issued by a party to the action to give evidence in the action. The words of the rule are quite general, and there is no reason why its operation should be limited by the suggested introduction of the words "by any party." It is a fallacy that a third party cannot apply "in" an action, and, in fact, applications such as the present one to set aside subpœnas have been made in chambers.

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(1) [1912] W. N. 200.

(2) (1928) 44 Times L. R. 303.

(3) (1925) 41 Times L. R. 508, 509.

(4) (1883) 12 Q. B. D. 136 and (in the Court of Appeal) (1884) 165.

LORD HEWART C.J. The rule nisi in this case was in the following terms: "It is ordered that Monday, July 9 next, be peremptorily given to the defendants, the Investors' Review, Ld., to shew cause why a certain writ of subpœna issued on behalf of the said defendants commanding the said Sir Arthur Wheeler to attend at the trial of a certain action (1928. R. No. 115), in which Rolls Razor (1927) Ld., are the plaintiffs, and the London Caledonian Press, Ld., are the defendants, to give evidence on behalf of the said defendants, the Investors' Review, Ld., and to produce at the trial aforesaid the documents set out in the said writ of subpœna, should not be set aside: Upon the grounds that the issue of the said writ was oppressive and an abuse of the process of the Court, Upon notice of this order to be given to the said defendants in the meantime."

It is now urged that these proceedings are entirely misconceived, and an objection, in the nature of a preliminary objection, has been taken. It is contended that this proceeding is governed by the Rules of the Supreme Court, and in particular by Order LII., r. 2, which is as follows: "No motion or application for a rule nisi or order to show cause shall hereafter be made in any action, or (*a*) to set aside, remit, or enforce an award, or (*b*) for attachment, or (*c*) against a sheriff to pay money levied under an execution."

It was contended by counsel showing cause that this application was one "in" the action within the meaning of the rule. By the applicant it was contended that though it had reference to and was concerned with the action, it was not an application "in" the action. Obviously the distinction is a fine one, and the question is on which side of the line the matter falls.

It is clear that this application is not made by either party to the action. It is made against the defendants, but not by the plaintiffs. It is thereby sought by a proposed witness in the action to set aside a subpœna issued in the action by a party to the action, under the title of the action, calling on him to give evidence in the action. Admittedly, if the application had been made by a party to the action it would have been "in" the action. It is to be observed that Order LII., r. 2, says: "No motion or application for a rule nisi or order to show cause shall hereafter be made in any action"; it does not say "in any action by any party to the action"; the matter is left quite general. One looks, therefore, for some authority showing that the words "by any party" should be imported into the rule. But there is no such authority, and the suggestion involves the application of a very familiar fallacy. No doubt in some of the cases the decision was based on the fact that the application was made by a party to the action. But no decision enumerates all the cases that could fall within Order LII., r. 2. Still less can it be said that an application is not "in" an action because it was made on behalf of a proposed witness in the action. Nevertheless it has been contended on behalf of the applicant that there could be an application "in" an action only by a party to the action. But many applications are made by persons not parties to the action, at all stages, from the service of the writ to setting aside the judgment and execution.

I think that the preliminary objection must be upheld. A decision to the contrary would require the introduction of words limiting the generality of the rule, and it would be a limitation of a crucial and far-reaching character to read into the rule the words "by any party to the action." Our attention has been directed to numerous cases in which a writ of attachment for contempt has been asked for. Not much illumination is to be derived from them in the present case, because when one compares the Rules of the Supreme

Court with the Rules of the Crown Office one finds that special provision is made for those cases. (1)

ACTON J. I agree.

BRANSON J. I agree.

Rule discharged.

Solicitors showing cause: *Chamberlain & Co.*
Solicitors in support: *Clifford-Turner, Hopton & Lawrence.*

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(1) By Order XLIV. of the Rules of the Supreme Court and rr. 261 et seq. of the Crown Office Rules.

W. L. L. B.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1928.

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